91-1251

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAINEY BROTHERS CONSTRUCTION COMPANY, INC. AND TRACY RAINEY,
PETITIONERS

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT, CITY OF MEMPHIS and THE CITY OF MEMPHIS BUILDING DEPARTMENT,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS, WESTERN SECTION

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where a municipal Board of Adjustment revoked a previously granted land use variance without notice to the property owner which had obtained a building permit based upon the variance and was in the process of constructing an apartment complex, and thereafter the Board refused to grant the owner a hearing, has the property owner been denied due process of law and has it suffered a taking of its property without just compensation?

II. Where the property owner sued the Board of Adjustment and the municipality for damages and also sought review of the administrative action by petition for certiorari under the circumstances summarized in Question 1, is it a denial of due process for the state courts to refuse to permit the landowner to amend its pleadings before trial, so as to assert federal constitutional and civil rights claims?

LIST OF ALL PARTIES

This petition has been filed under the same caption or style as that utilized by the Tennessee Court of Appeals. That caption, however, does not include the individual members of the Board of Adjustment who are also parties. All of these individuals are residents and citizens of Shelby County, Tennessee. Their names are Rufus Jones; Mrs. T. Kyle Creson, Jr.; Robert Knapp; John F. Palmer; Jerry E. Taylor; Carrie Whitehead; Barney Golding; John S. Shephard. The City of Memphis is a municipal corporation, and the City of Memphis Building Department is a division of the municipality. The Memphis and Shelby County Board of Adjustment is an administrative agency involved in land-use control, including the granting of variances. Petitioner Rainey Brothers Construction Co., Inc., is a privately owned corporation.

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RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS, WESTERN SECTION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Rainey Brothers Construction Company, Inc. and Tracy Rainey pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Tennessee, Western Section, entered in the above entitled cause on May 24, 1991.

OPINIONS BELOW

None of the orders or opinions of any of the lower courts have been reported. Orders of the Circuit Court of Shelby County, Tennessee are printed in Appendix, pp. A-18 through A-24. The opinion and judgment of the Court of Appeals are printed in the Appendix, pp. A-1, A-15. The orders of the Supreme Court of Tennessee denying the application of petitioners for review but staying further proceedings until action of this Court are printed in the Appendix at pp. A-16, A-17. The order of the Supreme Court of Tennessee denying review was entered on November 12, 1991, and this petition is filed within 90 days of the date of that order.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Petitioners aver that the final judgment of the highest court of Tennessee in which a judgment could be had deprives petitioners of the rights, privileges and immunities provided under the fifth and the fourteenth amendments to the United States Constitution and under 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In relevant part the fifth amendment to the Constitution of the United States provides:

> ... nor shall private property be taken for public use, without just compensation.

The relevant portion of the fourteenth amendment to the Constitution of the United States reads:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The statutory provision relied upon by the petitioners in their amended pleadings is the first sentence of 42 U.S.C. § 1983 as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In this case the Tennessee Court of Appeals, Western Section, affirmed the action of the trial court in refusing to permit the property owner to amend its pleadings so as to assert federal constitutional and civil rights claims. The opinion of the Court of Appeals, which is appended hereto, was rendered on May 24, 1991 and is not reported. Petitioners sought review in the Supreme Court of Tennessee, but their application was denied by order of that court filed on November 12, 1991, a copy of that order, which is also unpublished, being appended to this petition. This petition is filed within ninety (90) days from the date of the order of the Supreme Court of Tennessee.

The property owner seeks review in this Court, believing that it has suffered a denial of procedural and substantive due process, that its property has been taken without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and in violation of its civil rights under 42 U.S.C. § 1983.

This case has not ever been tried. The landowner believes that it is entitled to assert federal constitutional and statutory rights and seeks review here of the action of the state courts in denying it an opportunity to do so.

There is no dispute as to the material facts in this case. The action is still pending in the Circuit Court of Shelby County, Tennessee, where it will proceed to trial on original pleadings filed in 1976 unless this Court grants review. Those pleadings were general in nature and were based on the facts of the case. By amendments the landowner has sought to particularize its claims, including federal constitutional and civil rights claims. It believes these to be meritorious under the decisions of this Court, but to date its attempts to amend have been disallowed.[1]

The case, as shown in the amended pleadings, has had a long and complex history. The landowner acquired a tract of land of nearly 14 acres in Memphis, Shelby County, Tennessee in 1964. It sought permission to develop the property by erecting single residence dwellings, but its attempt to do so was denied because of objections of a neighboring property owner. The landowner then sought to develop the property by building townhouses, but this use was also denied. Finally, the property owner sought to develop a 165 unit apartment complex on the property, and a building permit for this purpose was granted through action of

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[1] Petitioners have reproduced in the Appendix the original complaints in each of the two suits filed in May, 1976. For brevity, the amended complaints in only one of the cases have been included. The allegations of the Second Amended Complaints in each case are almost identical. Only one set of the exhibits to the pleadings has been included, these being appended to the original complaint for damages in action No. 73473 T.D. The same exhibits were attached to the other complaints.

the Memphis and Shelby County Board of Adjustment on December 22, 1969. This use was permitted at an elevation level of 274.9 feet mean sea level (msl).

The objecting property owner contested this permit to the petitioners by seeking review through the state courts for several years. Its objections were unsuccessful, and finally by action of the Supreme Court of Tennessee in 1972 the granting of the permitted use was affirmed and the building permit was obtained.

Subsequently, the property owner sought a variance to permit a fill to a level of 270 feet msl. After application by the landowner, and based upon engineering reports, on August 27, 1975 the Board of Adjustment granted the variance. The landowner obtained a permit, arranged financing, entered into construction contracts and began building the project.

Suddenly and without notice to the landowner, on April 28, 1976, eight months after having granted the variance, the Board of Adjustment rescinded its action and reinstated the previously required elevation of 274.9 feet msl.

As recognized by the Tennessee Court of Appeals, this action was taken without notice to the landowner or without a hearing. The landowner timely filed a petition for reconsideration, but the Board of Adjustment refused to grant the petition and denied it without a hearing on May 26, 1976. The landowner immediately filed two suits in the Circuit Court of Shelby County, seeking review of the action of the

Board as being arbitrary and capricious, and also claiming damages against the City of Memphis as a result of the action of the Board of Adjustment.

No responsive pleading was filed by the defendants to the two actions, but the administrative record before the Board of Adjustment was duly prepared and transmitted to the Circuit Court for review on certiorari.

The landowner was devastated financially by the action of the Board, because it had to abandon the construction project that had already been commenced and had reached the framing stage. A fill of more than four (4) feet would have been required over the entire area, and the cost of demolishing the partially erected project and making that fill would have been prohibitive. The landowner suffered severe financial losses as a result of the action of the Board of Adjustment, and it was unable to pursue the case actively for a long period of time.

No responsive pleadings were filed by any of the municipal officials or by the City itself, and the case lay dormant in the Circuit Court of Shelby County, Tennessee, until 1988. At that time by proper amendments the landowner sought to increase the amount sued for and to assert both state and federal constitutional claims for taking without just compensation, and to assert claims for violation of federal civil rights statutes.

Despite the fact that no responsive pleadings had been filed and that the landowner was seeking to assert federal claims arising out the original action of the Board of Adjustment, the courts below denied the amendments and directed that the case proceed to trial without inclusion of the landowner's federal claims.

REASONS FOR GRANTING WRIT OF CERTIORARI

This Court has recently granted petitions for certiorari in three land use cases, all presenting questions of whether the arbitrary actions of local governmental bodies or agencies amounted to a taking of a landowner's property without just compensation. These cases are *Lucas v. South Carolina Coastal Council*, 91-453; *PFZ Properties, Inc. v. Rodriquez*, 91-122; and *Yee v. The City of Escondido*, 90-1947.

In the first of these cases, the landowner bought two oceanfront lots zoned for single-family dwellings. Shortly thereafter a state statute was enacted which prohibited the landowner from building any permanent structure on the lots. The Supreme Court of South Carolina held that the landowner had not suffered an unconstitutional taking of property without just compensation, and this Court has granted review.

In the *Yee* case, local land use ordinances regulating the terms of tenancy and of rent were challenged unsuccessfully in the lower courts as being so restrictive as to amount to a taking. In the *PFZ Properties, Inc.* case, a governmental agency refused to process construction drawings for a tourist and residential

project because it was opposed by a citizens' group. There, as in the amended complaints in the present case, it was alleged that political considerations and discriminatory practices were involved in the actions of the administrative agency.

The actions of the Board of Adjustment of Memphis and Shelby County in the present case are more arbitrary and egregious than those in the cases just cited. Under motions to dismiss, those actions have been admitted. The only justification ever asserted for them was that the variance granted to the property owner in August 1975 had not been preceded by a public hearing. But notice of the variance was furnished by the Board to the objecting landowner. Its attorney wrote a letter to the Board, voicing an objection, but he took no further action. After the granting of the variance, the time for review under Memphis City ordinances elapsed without any kind of appeal or review being sought. Thereafter the petitioners obtained a building permit, incurred heavy financial obligations and began to construct their apartment complex. When the complex was well under way, about eight months after the variance had been granted, the Board of Adjustment suddenly and without notice to the property owner, or without any kind of public hearing, revoked the variance. The property owner suffered disastrous financial results from this action and was effectively deprived of any viable economic use of its property thereby. As stated previously, the property owner had for many years prior to obtaining the variance sought to develop the property for other purposes, including single residences or townhouses, and all of these efforts had been denied.

With the revocation of its variance, the landowner was denied the last viable economic use of its property, and it has insisted in these proceedings that the action of the Board was arbitrary, capricious, violative of fundamental due process and violative of federal constitutional provisions and federal civil rights statutes.

The case has not ever been tried, and the property owner clearly has sought to assert all of its rights in the litigation. It specifically asserted federal claims in its amended complaints in 1988 and 1989, at a time when no responsive pleading had been filed. To the present time there has been neither affidavit nor any other type of evidence indicating any prejudice to the respondents as a result of the amendments.

Petitioners earnestly believe that their federal constitutional and civil rights claims, as asserted in their amended pleadings, are valid, and that they are entitled to a hearing thereon. The result of this case may well be affected by the decision of this Court in the three cases which it has recently agreed to review, cited above, but the facts of this case seem to be more aggravated than the facts in any of those cases or in any of the reported cases from this Court holding that a taking of land may occur when land use regulation impermissively frustrates distinct "investment-backed expectations." *See* *Loretto v. Teleprompt of Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.ed.2d 868, 876 (1982); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 170, 105 S.Ct. 3108, 87 L.ed 2d 126 (1985).

The courts below have asserted different reasons for not permitting petitioners to proceed with their federal claims in the pending litigation. The trial judge, in his order dated August 2, 1989, held that petitioners had failed to demonstrate any violation of federal rights since state law provided "an adequate post-deprivation remedy." A-19. This conclusion was not commented upon by the Court of Appeals in its decision. Rather, the Court of Appeals held that the claims constituted "new causes of action", and for that reason would not be permitted.

Petitioners believe that the refusal of the state courts to permit their assertion of federal constitutional and statutory claims in pending litigation is violative of federal due process and equal protection principles when the claims asserted arose out of the very transaction or set of facts asserted in the original pleadings filed immediately after the action of the Board took place. There is no claim of any subsequent or later act or transaction. If indeed the act of the Board of Adjustment was so arbitrary and so deprived the landowner of its rights as to preclude any viable economic use of its property, a taking occurred and federal civil rights were denied in April, 1976 and have continuously been denied ever since. The litigation stems from that date and was filed promptly thereafter. The Board has never seen fit to rescind its action or even to grant a hearing to the property owner.

Petitioners have sought from the beginning to assert all of the remedies available to them from the arbitrary and capricious action of the Board of

Adjustment, including reversal of its action and damages caused thereby. Their valuable property has lain undeveloped and unusable since the actions of the Board, all of which were taken without notice or a hearing, and after a building permit had been obtained and financial commitments incurred thereon.

The numerous decisions of this Court dealing with violations of due process and regulatory action amounting to a taking of property are cited and discussed in the petitions and the amici briefs filed in the three cases cited above in which review has been granted by the Court.

CONCLUSION

The principles enunciated in previous decisions of the Court are clearly applicable here. The action of the Board of Adjustment in revoking without notice a variance after building permits had issued and construction begun and then denying the landowner even a hearing to review its action clearly violated every concept of procedural due process.

That action also effectively terminated the efforts of the landowner to develop its valuable property. It eliminated totally the economic use of the land because previous efforts at the only other alternative uses had all been denied. The landowner's attempts to obtain full redress under state law have been cut off by the refusal of the state courts to permit amendments to the landowner's timely filed suits for relief. We believe that the decision of the state courts is erroneous and

technical in the extreme in holding that the amended pleadings did not relate back and that they embraced "new causes of action" not included in or arising out of the original action of the Board of Adjustment in 1976. Nevertheless that decision demonstrates that the landowner has no effective post-deprivation procedures available to it under state law, so that its federal claims are "ripe" or mature and should be permitted to be asserted in the still pending state court action.

Tennessee was one of the last states to permit federal civil rights actions to be maintained in its state courts. Earlier it had held that such actions must be asserted in federal courts. *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). That decision was overruled in the case of *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986). The present suit, therefore, is pending in a court having jurisdiction of the subject matter and of the parties. The federal claims asserted arise out of and are directly related to the arbitrary actions of a local governmental agency which clearly violate every principle of procedural and substantive due process, and which obviously have resulted in a taking of the landowner's property by depriving the owner of all viable economic use thereof.

Petitioners respectfully pray that this Court grant their petition for a writ of certiorari to the end that this case may be brought before this Court for disposition consistent with the action taken by the Court in the three similar cases cited above in which review has already been granted.

Respectfully submitted,
S/William J. Harbison

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IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

RAINEY BROS. CONSTRUCTION COMPANY, INC. and TRACY RAINEY
Plaintiffs/Appellants

v. Shelby Law # 64

MEMPHIS & SHELBY COUNTY BOARD OF ADJUSTMENT, CITY OF MEMPHIS and CITY OF MEMPHIS BUILDING DEPARTMENT
Defendants/Appellees

From the Circuit Court of Shelby County, Tennessee
The Honorable William W. O'Hearn

William J. Harbison, Nashville
Attorney for Appellants

Monice Moore Hagler, Memphis
E. Brady Bartusch, Memphis
Attorneys for Appellees

Opinion Filed: May 24, 1991

AFFIRMED

HIGHERS, J.

TOMLIN, P.J., W.S. (Concurs)
CRAWFORD, J. (Concurs)

This matter is before the Court on an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. This appeal arises from two cases which were filed simultaneously on May 27, 1976, in the Circuit Court at Shelby County, Tennessee. However, the Supreme Court referred to the cases as "now consolidated" in its order granting permission for the interlocutory appeal. The plaintiff, Rainey Brothers Construction Company, Inc. (Rainey Brothers), brings this appeal asserting that the trial court erred in sustaining defendants' motions to dismiss the second amended complaints in hoth Circuit Court actions and in not allowing the proposed amendments to each complaint pursuant the Rule 15 of the Tennessee Rules of Civil Procedure.

Rainey Brothers owns a 13 acre tract of land in Memphis on which it planned to huild a 165 unit apartment complex. On December 22, 1969 the Memphis and Shelby County Board of Adjustment (the Board) approved construction of 165 apartments on the subject property at an elevation level of 274.9 msl. A request was submitted to the Board by Rainey Brothers for an interpretation of a condition on a previous application regarding the fill elevation level of the subject property. Pursuant to that request, on August 27, 1975, the Board ruled that the property need only be filled to an elevation of 270 msl. as recommended by the City of Memphis Engineering Department, rather than the previously required elevation of 274.9 msl. The Board relied upon the written recommendation of the Deputy City Engineer, which states that the 270 msl elevation is

consistent with other new construction in the area. Following the Notice of Disposition lowering the fill elevation level of the subject property to 270 msl Rainey Brothers waited approximately 60 days before beginning construction in case an appeal was filed. No appeal was filed within that time and Rainey Brothers began construction in accordance with a fill elevation level of 270 msl. Apparently, there was a group of citizens who objected to the project and their interests were represented in a letter from a local attorney to the City of Memphis Building Department in which objection was taken to the fact that no public hearing was held and no notice was given to anyone of the change in a "substantial condition" in the Notice of Disposition issued regarding the subject property. On April 28, 1976, eight months after the Board's ruling, the Board rescinded its action of August 27, 1975 and reinstated the previously required elevation of 274.9 msl.

Subsequently, on May 25, 1976, Rainey Brothers filed a Petition for Reconsideration asking the Board to reconsider its new disposition. The Board refused to grant the Petition for Reconsideration.

On May 27, 1976, Rainey Brothers simultaneously filed two actions in the Circuit Court. The first action ("Rainey I") is against the Board and the City of Memphis Building Department. That action is captioned "Petition for Certiorari, Supersedeas, Injunction and Other Relief." In that action Rainey Brothers seeks an injunction superseding the action of the Board and preventing the City of Memphis Building Department from

enforcing the Board's ruling. The second action ("Rainey II") is brought against the City of Memphis and the City of Memphis Building Department and seeks damages resulting from the Board's ruling.

On November 14, 1988, Rainey Brothers simultaneously filed amended complaints in both actions setting forth the facts in greater detail. At that time the defendants had not yet filed any answer. Rainey Brothers later made a Motion to Amend the Amended Complaints. The trial court entered an order allowing Rainey Brothers to file the second amended complaints and the second amended complaints were both filed on March 8, 1989. Defendants moved to dismiss the second amended complaints and their motions were granted. On August 2, 1989, the trial court dismissed the second amended complaint in both actions stating that the causes should proceed on the original pleadings. The order states that the defendants shall only be those defendants as set forth in the original pleadings filed on May 27, 1976. The court also found that the second amended complaints bring up new causes of action which are barred by the statute of limitations and do not relate back to the original pleadings. It is on this order that Rainey Brothers appeals. Rainey Brothers asserts that the trial court erred in granting defendants' Motion to Dismiss the Second Amended Complaints and in not allowing the proposed amendments.

I.

Rainey Brothers attempts to add to the action in several ways through the second amended complaints. First Rainey Brothers made several additions to the named defendants in both suits. In Rainey I Rainey Brothers added each of the members of the Board, individually, as defendants. In Rainey II Rainey Brothers added the Board and each of its members individually as defendants.

The amendment of complaints is governed by Rule 15 of the Tennessee Rules of Civil Procedure. Rule 15.03 states:

> **Rule 15.03 Relation Back of Amendments** Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a misnomer or other

> similar mistake concerning the identity of the proper party, the action would have been brought against him. Except as above specified, nothing in this rule shall be construed to extend any period of limitations governing the time in which any action may be brought.

Rule 15.03 sets forth two requirements which must be met in order for an amendment to change the parties against whom the claim is asserted. First, the new parties must have received such notice of the action that they will not be prejudiced in maintaining their defense. See Goss v. Hutchins, 751 S.W.2d 821, 824 (Tenn. 1988); Lease v. Tipton, 722 S.W.2d 379, 380 (Tenn. 1986). It is reasonable to assume that the members of the Board were aware of both actions brought by Rainey Brothers before they were made parties to the actions pursuant to the second amended complaints. However, Rule 15.03 requires more than merely that a potential new defendant be aware of the existence of the action prior to being made a party. The second requirement is that each potential new party must have known that but for a misnomer or mistake concerning his or her identity, the action would have been brought against him or her. Lease v. Tipton, supra. Furthermore, it has been held that the plaintiff has the burden of showing that the failure to name the new defendants in the original complaint resulted from a mistake concerning the identity of the proper parties. Smith v. Southeastern Properties, 776 S.W.2d 106 (Tenn.

App. 1989). A mistake within the meaning of Rule 15.03 does not exist simply because the party who may be liable for conduct alleged in the original complaint was omitted as a party defendant. Id. at 109. The circumstances of the case before us do not satisfy the second requirement. Rainey Brothers has failed to show that the Board and its individual members knew that but for Rainey Brothers' mistake, they would have been named as parties to the actions to which they were later added by the second amended complaints. Furthermore, Rainey Brothers has failed to show that the failure to name these defendants in the original complaints resulted from a mistake concerning their identity. The defendants must remain those named in the original pleadings.

II.

Rainey Brothers introduces several new claims to the action through the second amended complaints. Particularly noteworthy are the claims of taking, through a violation of the fith and fourteenth amendments to the United States Constitution and article 1 section 21 of the Tennessee Constitution, violation of 42 U.S.C. § 1983 and inverse condemnation.

As provided in Rule 15, only those claims which relate back to the original pleadings are saved from the effects of the applicable statute of limitations. Tenn. R. Civ. P. 15.03. However, where the amendment in substance raises a new cause of action, the courts have repeatedly held that the amendment does not relate back

to the original pleadings and the statute of limitations continues to run until the amendment is filed. Energy Sav. Prods. Inc. v. Carney, 737 S.W.2d 783 (Tenn. App. 1987). Thus, the real question is whether the amendments raise a new cause of action.

There are several methods of determining whether an amendment raises a new cause of action or merely relates back to the original pleading. See Gamble v. Hospital Corp. of America, 676 S.W.2d 340 (Tenn. App. 1984). Tennessee courts have generally followed the statutory standard that the amendment must arise from the same conduct, transaction or occurrence as set forth in the original pleadings. Karash v. Pigott, 530 S.W.2d 775 (Tenn. 1975). Notice to the defendant is not expressly required by the statutory standard for relation back but the Tennessee Supreme Court has determined that notice is the critical element involved in determining whether amendments to pleadings relate back. Floyd v. Rentrop, 675 S.W.2d 165, 168 (Tenn. 1984).

Rainey Brothers asserts that the claims of taking, violation of 42 U.S.C. § 1983 and inverse condemnation all relate back to the original pleadings. In order to test the adequacy of notice to the defendants regarding these claims we must look at the general fact situation set forth in the original pleadings. The original complaints ask merely that the actions of the Board be ruled illegal, arbitrary, and capricious; that an injunction be issued superseding the Boards actions; that the Board be enjoined from enforcing the action, and; that Rainey Brothers be given reasonable damages under $35,000.

Nothing in the general fact situation set forth in the original complaints put the defendants on notice that they may have to defend any of the forgoing claims of taking, 42 U.S.C. § 1983 or inverse condemnation. Given the fact that the defendants were not on notice from their original pleadings that they may have to defend these claims, the amendments do not relate back to the original pleadings and given the fact that the amendments were filed over 12 years after the original pleadings, the defendants would be unfairly prejudiced if they were made to defend these new causes of action.

Thus, we affirm the trial court finding that the second amended complaints do not relate back to original pleadings as required by Rule 15 and finding that the trial court did not err in sustaining defendants' motions to dismiss the amended complaints. Costs are assessed to Rainey Brothers.

S/ Highers
HIGHERS, J.

TOMIIN, P.J., W.S. (Concurs)

CRAWFORD, J. (Concurs)

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

RAINEY BROS. CONSTRUCTION COMPANY, INC. and TRACY RAINEY
Plaintiffs/Appellants

v. Shelby Law #64

MEMPHIS & SHELBY COUNTY BOARD OF ADJUSTMENT, CITY OF MEMPHIS and CITY OF MEMPHIS BUILDING DEPARTMENT
Defendants/Appellees

O R D E R

This matter came on to be regularly heard and considered by the Court on the record, and for the reasons stated in the Opinion of the Court, filed this date, it is ordered that:

1. The judgment of the trial court is affirmed.

2. Costs are adjudged against Rainey Brothers for which execution may issue, if necessary.

ENTERED MAY 24, 1991

s/ Highers
HIGHERS, J.

s/Tomlin
TOMLIN, P.J., W.S.

s/Crawford
CRAWFORD, J.

IN THE SUPREME COURT OF TENNESSEE

RAINEY BROS. CONSTRUCTION
COMPANY, INC. AND TRACY RAINEY,
Plaintiffs-Appellants,

v. Shelby Law No. 64
No. 53654-8 R.D.

MEMPHIS & SHELBY COUNTY BOARD
OF ADJUSTMENT, ET AL.,

Defendants-Appellees.

and

RAINEY BROS.CONSTRUCTION
COMPANY, INC. AND TRACY RAINEY,

Plaintiffs-Appellants,

Shelby Law No.
v. No. 73473-8-T.D.

THE CITY OF MEMPHIS, ET AL.,

Defendants-Appellees.

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause,

it is the decision of the Court that the application should be and the same is hereby denied.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

RAINEY BROS. CONSTRUCTION
COMPANY, INC. and TRACY RAINEY,
Plaintiffs-Appellants

vs. Shelby Law #64
No. 53654-8 R.D.

MEMPHIS & SHELBY COUNTY BOARD
OF ADJUSTMENT, et al.,
Defendants-Appellees

RAINEY BROS. CONSTRUCTION
COMPANY, INC. and TRACY RAINEY,
Plaintiffs-Appellants
vs. Shelby Law #
No. 73473-8-T.D.

THE CITY OF MEMPHIS, et al.,
Defendants-Appellees

ORDER

Upon motion of plaintiffs-appellants and for good cause shown, it is ordered that the mandate of this court and all further proceedings be stayed through February 10, 1992, and thereafter during the pendency of a Petition for Certiorari to the Supreme Court of the United States if such petition is timely filed by plaintiffs-appellants.

Entered this ___ day of _____, 1991.

FOR THE COURT

By: S/Frank F. Drowota III
Justice

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

RAINEY BROTHERS CONSTRUCTION COMPANY, INC., AND TRACY RAINEY, INDIVIDUALLY,

Petitioner,

No. 53654-8 R.D.

VS.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT, COMPOSED OF: RUFUS JONES; MRS. T. KYLE CRESON, JR.; ROBERT KNAPP; JOHN F. PALMER; JERRY E. TAYLOR; CARY WHITEHEAD; BARNEY GOLDING; JOHN S. SHEPHARD; AND EACH, INDIVIDUALLY; AND THE CITY OF MEMPHIS, A MUNICIPAL CORPORATION; AND THE CITY OF MEMPHIS BUILDING DEPARTMENT,

Defendants.

ORDER GRANTING MOTION TO DISMISS

This cause came on to be heard upon the Defendants' Motion to Dismiss the Second Amended Complaint, argument of counsel, and the entire record in this cause, from all of which;

It appears to the Court that the Defendants' Motion to Dismiss is well taken and that the Second Amended Complaint should be dismissed and that this cause should proceed on the original pleadings filed on May 27, 1976, with the Defendants being only the original Defendants as set forth therein, and the Court will decide at a subsequent date the issue as to the right of the Petitioners to substitute Tracy Rainey, individually, as a Petitioner in this cause.

It further appears and the Court so finds that the Second Amended Complaint fails to state a claim upon which relief can be granted; that the action for inverse condemnation is a new cause of action and not properly a part of the pleadings before the Court, and the one-year Statute of Limitations (Tenn. Code Ann. 29-16-124) bars the Petitioner from inverse condemnation; that the claim for violation of Civil Rights 42 U.S.C. 1983, et seq., is a new cause of action that is barred by the one-year Statute of Limitations set forth in Tenn. Code Ann. 28-3-104(a); that there was no violation of state or federal laws or Constitution as an adequate post-deprivation remedy was provided by the state in the form of Tenn. Code Ann. 29-16-123, et seq., which Petitioner failed to utilize within the appropriate time; that because of the aforesaid statutes and law, including the appropriate application of the function of the Common Law Writ of Certiorari and the great period of time involved, that only the original Defendants in the original pleading will remain parties; that the attempt to include the aforesaid allegations and the Board of Adjustment members in their individual capacities constitute new causes of action, which do not relate back to the original pleadings, as there was no notice in the original pleadings of these new causes of action under the most liberal reading thereof; that damages are not recoverable under the Common Law Writ of Certiorari, which is the appropriate mechanism for judicial review of actions of the Memphis and Shelby County Board of Adjustment.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss the Second Amended Complaint is granted for the reasons above set forth and that the Second Amended Complaint is dismissed; that this cause will proceed on the original pleading filed on May 27, 1976, with the original Defendants as named therein being the only defendants and does not include the members of the Memphis and Shelby County Board of Adjustment in their

individual capacity, and the Court will decide at a subsequent date the issue as to the right of the Petitioner to add or substitute Tracy Rainey, individually, as a Petitioner in this cause; and that there being no just reason for delay, that a final judgment on the Motion to Dismiss the Second Amended Complaint is hereby entered in favor of the Defendants and the Defendants are allowed thirty (30 days from the entry of this Order to respond to the original Petition.

S/William W. O'Hearn
JUDGE
DATE: 2 August 1989

S/Hugh C. Howser
Attorney for Petitioner

S/ E. Brady Bartusch
Attorney for Defendants

A TRUE COPY ATTEST
Clint Crabtree, Clerk
_____D.C.

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

RAINEY BROS. CONSTRUCTION COMPANY, INC. and TRACY RAINEY, Individually,

Petitioners,

v. No. 53654 R.D.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT, composed of: RUFUS JONES; MRS. T. KYLE CREASON, JR.; ROBERT KNAPP; JOHN F. PALMER; JERRY E. TAYLOR; CARY WHITEHEAD; BARNEY GOLDING; JOHN S. SHEPHARD; and each, individually; and the CITY OF MEMPHIS, a municipal corporation; and the CITY OF MEMPHIS BUILDING DEPARTMENT,

Defendants.

ORDER

This cause came before the Court on January 5, 1990, upon Petitioners' Motion for Permission to Appeal the Order entered by the Court on August 2, 1989,

granting Defendants' Motion to Dismiss the Second Amended Complaint in this action and ordering the case to proceed on the original pleadings (the "Order"). The Order contained language which appears to render the Order a final judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. However, inclusion of said language was in error. The Order is an interlocutory order which may be appealed only by permission granted pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure.

As a result of the Order, Petitioners must proceed to trial on the original petition for certiorari which, according to the Court's interpretation, is a petition for a common law writ of certiorari rather than a statutory writ as asserted by Petitioners. Because the only remedy available under a common law writ is limited to invalidation of the lower tribunal's action, Petitioners will be unable to recover damages and will not obtain de novo review of the Board of Adjustment's action. It would serve no useful purpose to try this case on the assumption that Petitioners are confined to the limited scope of review and remedies permitted under a common law writ of certiorari, appeal the case after the trial, and then try the case once again as a proceeding on a statutory writ of certiorari in the event the Court of Appeals determines that the amendments contained in the Second Amended Complaint should have been allowed. Such a course of action would involve a great deal of time, expense and inconvenience to all of the parties, as well as to the Court. The Court is of the opinion that permission to appeal the Order should be granted

pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure in order to prevent needless, expensive and protracted litigation.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioners shall be granted permission to appeal the Order.

IT IS FURTHER ORDERED that all proceedings before the Court in this case shall be stayed pending outcome of the appeal.

ENTERED this 13th day of February, 1990.

APPROVED FOR ENTRY:
TRABUE, STURDIVANT & DeWITT

BY: S/ Hugh C. Howser
Hugh C. Howser

BY: S/ Cynthia E. Berry
Cynthia E. Berry
25th Floor, 511 Union Street
Nashville, TN 37219
(615] 244-9270

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by U.S. Mail, postage

prepaid, to E. Brady Bartusch, Esquire, 314 City Hall, 125 North Mid America Mall, Memphis, TN 38103, this 16th day of January, 1990.

S/ Hugh C. Howser

CEBO110903.DS

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE FIFTEENTH JUDICIAL CIRCUIT
AT MEMPHIS

RAINEY BROS. CONSTRUCTION
COMPANY, INC.,
Petitioner,

vs. No. 73473 T.D.

THE CITY OF MEMPHIS, A Municipal
Corporation, and THE CITY OF
MEMPHIS BUILDING DEPARTMENT,
Defendants.

C O M P L A I N T

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF SHELBY COUNTY:

Comes now your petitioner and would respectfully show to the Court as follows:

1. That the petitioner Rainey Brothers Construction Company, Inc. is a corporation formed under the laws of the State of Tennessee and does business in Memphis and Shelby County and is the owner of a certain thirteen (13) acre tract of land located at Helene and Vera Cruz known as 5261 Helene in Memphis, Shelby County, Tennessee.

2. That the defendant City of Memphis is a municipal corporation and the defendant City of memphis Building Department is a department of the City of Memphis.

3. That on or about August 27, 1975 the Memphis and Shelby County Board of Adjustment a

quasi-judicial administrative bodyoperating under the laws of the City of Memphis acted upon certain information from the City of Memphis Engineering Department and upon correspondence from the petitioner Rainey Brothers Construction Company, Inc. and lowered the fill elevation of the property owned by petitioner from 274.9 msl to an elevation of 270 msl. A copy of the official desposition notice is attached hereto and made a part hereof as Exhibit A.

4. That on or about September 5, 1975 some several days after the Board met Frank M. Bosak, Building Ofifcial of the City of Memphis Building Department informed the Honorable William Walsh, Attorney representing Charles Glankler and others of the action of the Board in reducing the elevation from 274.9 msl to the 270 msl elevation. A copy of the letter is attached hereto as Exhibit B. That on or about September 11, 1975 the Honorable William M. Walsh responded to said letter to Frank M. Bosak, Building Official of the City of Memphis Building Department that he objected to the reduction of the 274.9 msl to the 270 msl elevation. A copy of the letter is attached hereto as Exhibit C.

That your petitioner Rainey Brothers Construction Company, Inc. waited approximately sixty (60) days from teh final action of the Board on August 27, 1975 to see if an appeal would be filed as provided int he city charter of the City of Memphis and the statutes of the State of Tennessee which no appeal was filed. That your petitioner in reliance upon the Board's ruling has taken out building permits and other necessary permits along with employing engineers, material men, suppliers,

plumbers, in furtherence of the building of certain buildings on subject property. That your petitioner had obtained releases from the first mortgage and obtained a committment for the construction of said building all said action in reliance upon the Board's decision of August 27, 1975.

That your petitioner would show to the Court that on April 7, 1976 some seven months after the Board's action of August 27, 1975 that William M. Walsh, Attorney representing the objectors sent a correspondence to the Memphis and Shelby County Board of Adjustment. A copy of said letter is attached hereto as Exhibit D. That on April 28, 1976 some eight months after the Board's action of August 27, 1975 the Memphis and Shelby County Board of ADjustment rescinded its action thereby causing your petitioner grievous and serious damages. A copy of the official desposition notice is attached hereto and made a part thereof as Exhibit E.

That following the Board's actioin of April 28, 1976 the City of Memphis Building Department forwarded to your petitioner a copy of the official desposition notice and informing petitioner that the elevation which the peittioner had been relying on for the past eight months had been changed which would cause your petitioner to have to tear down the construction heretofore done and fill the property to the 274.9 elevation and then rebuild the structure, all to his great detriment.

That your petitioner Rainey Brothers Construction Company, Inc. would show to the Court that in the hiring of all of the parties hereinabove and the purchase of material and other expenses that it has been damaged greatly in reliance upon the Board's action in any amount

as the Court may deem reasonable at the trial of this cause said amount not to exceed Thirty Five Thousand ($35,000.00) Dollars.

WHEREFORE, the petitioner alleges that it has been damaged to its great detriment in an amount which the Court deems reasonable at the trial of this cause said amount not to exceed Thirty Five Thousand ($35,000.00) Dollars.

WHEREFORE, PETITIONER PRAYS:

1. That the proper process be issued and served upon the City of Memphis and the City of Memphis Building Department and that they be required to answer but the answer need not be under oath the oath to the answer being expressly waived.

2. That at the trial of this cause that your petitioner such damages as seem reasonable said damages not to exceed Thirty Five Thousand ($35,000.00) Dollars plus the cost of this cause.

3. That the petitioner have such other, further and general releif as it may be entitled to upon the trial of this cause.

FARRIS, HANCOCK, GILMAN,
BRANAN & LANIER

By_____

Homer Boyd Branan, III
Attorney for Rainey Bros.
Construction Company, Inc.
1620 -First National Bank Building
Memphis, Tennessee 38103
523-8080

Sworn to and subscribed before me this 27 day of May, 1976.

S/David E. Bales
Notary Public

My Commission Expires:
4/14/80

F I A T

TO THE CLERK OF THE CIRCUIT COURT
OF SHELBY COUNTY, TENNESSEE:

Upon the filing of the foregoing Petition, Petitioners have given bond and security for costs according to law, issue a Writ of Certiorari as prayed for.

THIS 27 day of May, 1976.

S/ Greenfield Polk
JUDGE

A TRUE COPY ATTEST
Ben C. Wessels, Jr., Clerk
C. Crabtree D.C.

MEMPHIS AND SHELBY COUNTY
BOARD OF ADJUSTMENT
Room 517 City Hall * 125 North Main Street * Memphis, Tennessee 38103

NOTICE OF DISPOSITION

TO:Homer B. Branan, III, Attorney Date:August 29, 1975
1620 First National Bank Bldg. RE: Docket 690-110 City
Memphis, Tennessee 38103 Location 5261 Helene, (159 feet east of Vera Cruz Street)

On August 27, 1975, the Memphis and Shelby County Board of Adjustment is of the opinion that the buildable level heretofore imposed on the approval of this application in 1969 was to be that as recommended by the City Engineering Department to raise the subject property above flood grade. Therefore it is further the opinion of this Board that the applicant need not raise the subject property to a height greater than that now required by the revised recommendation of the City of Memphis Engineering Department as contained in the written report from the City Public Works Director, attached to this request, which now requires an elevation of two hundred seventy (270) feet as the approved buildable elevation.

All appeals and applications GRANTED are expressly conditioned upon the applicant obtaining the permit reuqired or other order within one (19) year from the date of the decision of the Board of Adjustment.

The resolution of the Board is subject to your inspection at the office of the Board of Adjustment.

Respectfully,
S/Robert Stacey
Robert Stacey
Secretary of the Board of Adjustment

EXHIBIT "A"

CITY OF MEMPHIS
INTER-OFFICE
MEMORANDUM

TO: Mr. Frank Bosak, Building Official
Date: July 10, 1975
FROM: William E. Bush
SUBJECT: Apartment Project at Helene & Vera Cruz
Rainey Bros. Construction Co.

The apartment project at Helene and Vera Cruz Streets by the Rainey Brothers Construction Company was approved by the Division of Public Works with a top of curb elevation of 274.9 msl.

Mr. Sam Reeves, engineer for the project, has requested that the Division of Public Works review the above top of curb elevation.

We have completed our review and feel that this elevation should now be 270.0 msl. This elevation is consistent with other new construction in the area.

S/ William E. Bush
William E. Bush
Deputy City Engineer
2748

WEB:mkl
CC: Mr. Frank P. Palumbo, Jr.

EXHIBIT B

CITY OF MEMPHIS
WYETH CHANDLER MAYOR
DIVISION OF PUBLIC SERVICE September 5, 1975

Mr. William Walsh, Attorney
Hanover, Walsh, Barnes and Jalenak
219 Adams Avenue Building
Memphis, Tennessee 38103

Re: 5261 Helene Road

Dear Mr. Walsh:

Please refer to my letter dated August 19, 1975, and to the Board of Adjustment Notice of Disposition dated March 5, 1970, concerning the referenced subject.

Item #4 of the above mentioned Notice of Disposition requires the subject property to be filled to an elevation of 274.9 feet. You are hereby advised that the Board of Adjustment, on August 27, 1975, rendered a written opinion that the condition imposed by Item #4 is no longer valid in light of a recommendation contained is a written report from the City Public Works Director, which sates that an elevation 270.0 msl is consistent with other construction in the area. Attached is a copy of the Notice of Disposition of the August 27th meeting, for your information.

If you have any questions, please advise.

Sincerely,
S/ Frank M. Bosak
Frank M. Bosak
Building Official

FMB:la
enclosure, as stated

Bureau of Construction Code Enforcement
Fourth Floor*City Hall*125 North Main Street
Memphis, Tennessee 38103

EXHIBIT "B"

September 11, 1975

Mr. Frank M. Bosak
Building Official
City of Memphis
4th Floor, City Hall
125 North Main Street
Memphis, Tennessee 38103

Dear Mr. Bosak:

Thank you for your letter of September 5, 1975.

It is my opinion that the Board of Adjustment has no right to change the condition imposed by the Board on March 5, 1970, without a public hearing. The Notice of Disposition, Item 4, on March 5, 1970, requires the subject property to be filled to an elevation of 274.9 feet, and this is an unequivocal statement.

In addition, it is my opinion that the Building Department of the City of Memphis had no authority whatsoever to issue the building permit on the subject property, since the disposition order itself says, "all appeals and applications granted are expressly conditioned upon the applicant obtaining the permit requested or other order within one year from the date of the decision of the Board of Adjustment." More than one year had expired from the date of the entry of the judgment in the Supreme Court of Tennesse and the date of the issuance of the permit by your office.

If the Board of Adjustment is going to change conditions on any mater that have been imposed by a Notice of Disposition in which the public is involved, then a public hearing must be held in order to properly change, amend or revise conditions.

Yours very truly,
William M. Walsh

WMW/mdb
cc: Mr. Charles Glankler

EXHIBIT "C"

Law Offices
HANOVER, WALSH, BARNES & JALENAK
219 Adams Avenue Building
Memphis, Tennesee 38103

J. Alan Hanover
William H. Walsh
W. Carlton Barnes
James O. Jalenak
Allen S. Blair

Stevan L. Black
Donald W. Schwendibahn
Mark A. Shklar

Telephone 526-0521
Area Code 901

Joseph Hanover
Counsel

David Hanover (1899-1963)

April 7, 1976

Mr. Robert Stacey
Secretary, Board of Adjustment
Room 517, City Hall
125 North Main Street
Memphis, Tennessee 38103

Re: Docket No. 69-110, City - Tracy Rainey

Dear Mr. Stacey:

I am mailing copies of thie letter to all the members of the Mmephis & Shelby County Board of Adjustment and the attorneys for the Board.

I have been requested by Mr. Charles Glankler of 5236 Helene Cove and Mr. Grady Pyron oif 5250 Helene Cove to write this letter in connection with the building permit of the City of Memphis B11031, dated 6/28/73, for the location at 5261 Helene in the name of Rainey Bros. Construction Company.

On August 27, 1975, the Board, apparently by a resolution, changed or removed a substantial condition in the notice of disposition issued on the 1969 application.

No notice was given to anyone and no public hearing was held. We suggest this action was void. On behalf of the residents most affected, especially Mr. Pyron adn Mr. Glankler, we respectfully request the Board ot issue an order stopping all action on the case and order notice given for a public hearing on the application to make a substantial change in the original conditions imposed by the Board, after a public hearing.

I am enclosing the following:

EXHIBIT "D"

1. Copy of my letter of July 16, 1975, to the Board of Adjustment and to Mr. Frank Bosak.

2. Copy of letter of Mr. Frank Bosak to me dated August 19, 1975.

3. Copy of letter of Mr. Frank Bosak to me dated September 5, 1975.

4. Copy of my letter of September 11, 1975, to Mr. Bosak.

5. Copy of building permit issued 6/28/73, more than one year from the date of the entry of the judgment in the Supreme Court of Tennessee filed June 8, 1972, according to the records of the Supreme Court Clerk.

It seems imperative to me that the Board of Adjustment have a public hearing before making any changes of a substantial nature, such as that attempted by the applicant in the above docketed case. In matters of this kind where a public body, such as the Board of Adjustment,

is attempting to protect the public interest, I do not believe that surrounding residents should be required to pay their own funds for private counsel to enforce regulations and ordinances of the City of Memphis and the Board of Adjustment.

I respectfully request, on behalf of the two property owners mentioned above, that all action concerning this property at 5261 Helene covered by the above-numbered docket be stopped and that notice be given for a public hearing to be held on the entire matter.

Yours very truly,
S/ Wm M Walsh
William M. Walsh

WMW/mdb
Enc.
cc: All members of Board of Adjustment
Mr. Grady Pyron
Mr. Charles Glankler
Ross Clark, Esquire

Law Offices
HANOVER, WALSH, BARNES & JALENAK
219 Adams Avenue Building
Memphis, Tennesee 38103

J. Alan Hanover
William H. Walsh
W. Carlton Barnes
James O. Jalenak
Allen S. Blair

Stevan L. Black
Donald W. Schwendibahn
Mark A. Shklar

Telephone 526-0521
Area Code 901

Joseph Hanover
Counsel

David Hanover (1899-1963)

April 7, 1976

Mr. Robert Stacey
Secretary, Board of Adjustment
Room 517, City Hall
125 North Main Street
Memphis, Tennessee 38103

Re: Docket No. 69-110, City - Tracy Rainey
Dear Mr. Stacey:

I am mailing copies of thie letter to all the members of the Mmephis & Shelby County Board of Adjustment and the attorneys for the Board.

I have been requested by Mr. Charles Glankler of 5236 Helene Cove and Mr. Grady Pyron oif 5250 Helene Cove to write this letter in connection with the building permit of the City of Memphis B11031, dated 6/28/73, for the location at 5261 Helene in the name of Rainey Bros. Construction Company.

On August 27, 1975, the Board, apparently by a resolution, changed or removed a substantial condition in the notice of disposition issued on the 1969 application.

No notice was given to anyone and no public hearing was held. We suggest this action was void. On behalf of the residents most affected, especially Mr. Pyron adn Mr. Glankler, we respectfully request the Board ot issue an order stopping all action on the case and order notice given for a public hearing on the application to make a substantial change in the original conditions imposed by the Board, after a public hearing.

I am enclosing the following:

EXHIBIT "E"

1. Copy of my letter of July 16, 1975, to the Board of Adjustment and to Mr. Frank Bosak.

2. Copy of letter of Mr. Frank Bosak to me dated August 19, 1975.

3. Copy of letter of Mr. Frank Bosak to me dated September 5, 1975.

4. Copy of my letter of September 11, 1975, to Mr. Bosak.

5. Copy of building permit issued 6/28/73, more than one year from the date of the entry of the judgment in the Supreme Court of Tennessee filed June 8, 1972, according to the records of the Supreme Court Clerk.

It seems imperative to me that the Board of Adjustment have a public hearing before making any changes of a substantial nature, such as that attempted by the applicant in the above docketed case. In matters of this kind where a public body, such as the Board of Adjustment,

is attempting to protect the public interest, I do not believe that surrounding residents should be required to pay their own funds for private counsel to enforce regulations and ordinances of the City of Memphis and the Board of Adjustment.

I respectfully request, on behalf of the two property owners mentioned above, that all action concerning this property at 5261 Helene covered by the above-numbered docket be stopped and that notice be given for a public hearing to be held on the entire matter.

Yours very truly,
S/ Wm M Walsh
William M. Walsh

WMW/mdb
Enc.
cc: All members of Board of Adjustment
Mr. Grady Pyron
Mr. Charles Glankler
Ross Clark, Esquire

MEMPHIS AND SHELBY COUNTY
BOARD OF ADJUSTMENT

Room 517 City Hall*125 North Main Street*Memphis, Tennessee 38103

NOTICE OF DISPOSITION

TO: William M. Walsh DATE: April 30, 1976
Attorney at Law RE: DOCKET 69-110 City
219 Adams Avenue LOCATION 5261 Helene, (159 feet east of
Memphis, Tennessee 38103 Vera Cruz Street)

On April 28, 1976 the Memphis and Shelby County Board of Adjustment rescinded its action of August 27, 1975, wherein Condition #4 was interpreted as follows:

> "The Memphis and Shelby County Board of Adjustment is of the opinion that the buildable level heretofore imposed on the approval of this application in 1969 was to be that as recommended by the City Engineering Department to raise the subject property above flood grade. Therefore it is further the opinion of this Board that the applicant need not raise the subject property to a height greater than that now required by the revised recommendation of the City of Memphis Engineering Department as contained in the written report from the City Public Works Director, attached to this request, which now requires an elevation of two hundred seventy (270) feet as the approved buildable elevation."

It is the opinion of the Board that this condition should not have been removed without a public hearing having been held; therefore, the action of August 27, 1975, is

hereby rescinded and that condition which existed prior to that date is reinstated and reads as follows:

4. "The subject property is to be filled to the elevation of 274.9 feet as outlined in "Table II, Flood Profile Information" of the Flood

- continued on reverse side of sheet -

All appeals and applications GRANTED are expressly conditioned upon the applicant obtaining the perm requested or other order within one (1) year from the date of the decision of the Board of Adjustment.

The resolutuion of the Board is subject to your inspection at the office of the Board of Adjustment.

Respectfully,
S/ Robert Stacey
Robert Stacey
Secretary of the Board of Adjustment

EXHIBIT "F"

Plan Information Report, Nonconnah Creek, Shelby County, Tennessee, which is a part of the Chickasaw Metropolitan Surface Water Management Survey, prepared by United States Department of Agriculture, Soil Conservation Service, and dated July, 1968."

EXHIBIT "F"

MEMO-LETTER

TO: Randy Massey
Board of Adjustment
City Hall

Date:
Subject: 69-110 City

I would like to file this petition to reconsider in the above case. I have mailed a copy to each board member. This matter must be acted on at the May 26, 76 meeting.

Thanks
Homer Branan

Wm. R. Massey

EXHIBIT G

BEFORE THE MEMPHIS & SHELBY COUNTY
BOARD OF ADJUSTMENT

Docket No. : 69-110 City

Property Located At: 5261 Helene (159 Ft. E. of Vera Cruz St.)

PETITION FOR RECONSIDERATION

TO THE HONORABLE MEMBERS OF THE MEMPHIS & SHELBY COUNTY BOARD OF ADJUSTMENT:

Comes your Petitioner, Rainey Brothers Construction Company, Inc. the owner of a certain tract of land upon which an application was filed under the above captioned docket number would respectfully request the Honorable Memphis & Shelby County Board of Adjustment to reconsider its action of April 28, 1976.

That at the regular meeting of August 27, 1975 the Board acted upon a correspondence item which was forwarded to said Board by letter dated August 21, 1975 requesting an interpretation of a particular condition. The condition under consideration was condition #4 which required the subject property to be filled to the 274.9 foot elevation as set forth in the official disposition notice and incorporated herein. That enclosed with the correspondence requesting the interpretation was a letter from Mr. William E. Bush, Deputy City Engineer stating the following:

> The apartment project at Helene and Vera Cruz Streets by Rainey Brothers Construction Company was approved by the Division of Public Works with a top of curb elevation of 274.9 msl.

> Mr. Sam Reeves, Engineer for the project, has requested that the Division of Public Works review the above top of curb elevations.
>
> We have completed our review and feel that this elevation should have the 270 msl. This elevation is consistent with other new construction in the area.

That based upon the information and the request that the elevation should now be 270 msl. in accordance with said letter and the request in the Petition for an interpretation by the owner Rainey Brothers Construction Company, Inc., the Board was gracious enough to act upon this interpretation at which time the Board stated as follows:

> On August 27, 1975 the Memphis & Shelby County Board of Adjustment is of opinion that the billable level heretofore imposed upon the approval of this application in 1969 was to be that as recommended by the City Engineering Department to raise the subject property above flood grade. Therefore it is further the opinion of this Board that the applicant need not raise the subject property to a height greater than that now required by the revised recommendation of the City of Memphis Engineering Department as contained in the written report of the City Public Works Director, attached to this request, which now requires an elevation of two hundred seventy (270) feet as the approved billable elevation.

That the official disposition notice of the Board's interpretation was dated August 29, 1975 and was received by your Petitioner on or about August 30, 1975. That eight (8) days after the action of the Board, Frank M. Bosak by letter dated September 5, 1975 informed William

M. Walsh the attorney representing the objectors that the Board had reduced the elevation from 274.9 to 270 msl. That on September 11, 1975 some fourteen (14) days after the Board acted, William M. Walsh attorney representing the objectors forwarded a response to Mr. Bosak, that he was of opinion that the Board of Adjustment had no right to change the condition imposed at the original hearing. That finally on April 7, 1976, some seven months after the Board reduced the elevation William M. Walsh, attorney representing the objectors, directed a letter to the office of the Board of Adjustment objecting to the decision. The board acting on Mr. Walsh's letter as a correspondence item reinstated the original condition #4 by substituting the original condition for its opinion as contained in the official disposition notice dated August 29, 1975. By this action the Board raised the elevation from 270 msl to 274.9 msl.

That Rainey Brothers Construction Company, Inc. would respectfully show to the Honorable Board that following the Board's action and reliance upon that action, Rainey Brothers Construction Company, Inc., engaged an engineer for finalization of plans and to obtain approval of the City Building Department. It further secured partial releases from the first mortgage holder in November of 1975 so that construction loan financing could be arranged. That Rainey Brothers Construction Company, Inc. relying upon the approval of the Board also obtained approval from the City Plumbing Department and had the sewer plans revised and obtained a plumbing permit. That inspections were made by the City of Memphis Building Department of the slab

construction and approved. The slabs were placed in position after receiving said approval, and in fact construction was well into the framing stages when the Board acted on April 28, 1976. Your Petitioner further secured financing of the project by obtaining a l...committment said committment in the approximate amount of Seventy Five Thousand ($75,000.00) Dollars and Rainey Brothers Construction Company, Inc. had contracted with numerous materialmen, engineers, plumbers, and suppliers for the furnishing of services and material said agreements are in full force and effect on Petitioner all of said action by Petitioner was in reliance to the Board's action in lowering the elevation.

That Petitioner would show that it was not until April 7, 1976, some seven months after the Board action that William M. Walsh Attorney representing the objectors took any affirmative action on the Board's ruling even though they were completely apprised of the Board's action of August 27, 1975 and they allowed your Petitioner to operate to his detriment. The charter of the City of Memphis requires that an objector to the Board's action should file an appeal within thirty (30) days. The section states as follows:

> Section 149. Same -- Certiorari to circuit court from decision of board -- Generally.
>
> Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any officer, department, board of bureau of the municipality, may present to the circuit court a petition, duly verified, setting forth such decision is illegal, in whole or in part,

specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the filing of the decision of the office of the board. (Priv. Acts 1925, ch. 428, Sec. 1)

That Rainey Brothers Construction Company, Inc., would respectfully request this Honorable Board reconsider its action of April 28, 1976 and reaffirm its opinion as set forth on the official desposition notice of August 29, 1975. Rainey Brothers Construction Company, Inc. would respectfully request this action based upon the fact that the City of Memphis Engineering Department has recommended a 270 msl elevation and further that your Petitioner for the last seven months has acted in reliance upon the Board's action in reducing the elevation and that it expended great sums of money in furtherence of this project when the objectors well knew of the action of the Board and allowed your Petitioner to operate to his detriment without said objectors filing appeal as required by law within thirty (30) days of the final action of the Board. This in and of itself has imposed a new and great hardship to which Rainey Brothers Construction Company, Inc. is entitled to relief.

Respectfully submitted,

S/ Homer Branan

Homer Boyd Branan, III
Attorney for Rainey Brothers
Construction Company, Inc.

EXHIBIT G

PROPOSAL Page No. of Pages

TOWN & COUNTRY PLUMBING CO., INC.

..Swinnea Road

Memphis, Tennessee 38119

362-7543

Proposal Submitted to Phone Date

Rainey Brothers Construction Co. 12-22-75

Street Job Name

City,State and Zip Code Job Location

Architect Date of Plans Job Phone

We hereby submit specifications and estimates for:

1. 5 ft. cast iron tub with 3 valve diverter, curtain rod, trip lever waster (Gerber)
2. Gerber water closet complete with seat (X 20) or equal
3. 4" center set Gerber lavatory faucet with pop-up
4. Gerber sinkfaucet with spray
5. 33 X 22 stainless steel sink furnished by us
6. Basins furnished by us (19" round steel)
7. All P.V.C. drains
8. Two sill cocks
9. 52 gallon electric water heaters
10. Washer connections with plastic box
11. Cut-off under each fixture
12. Condensation drain for air conditioning
13. Stub sewer and water line 5 ft. from building
14. 13.50 per foot for sewer and water line from building to street
15. Gas to furnace only

We propose hereby to furnish material and labor -- complete in accordance with above specifications, for the sum of Four Thousand Three Hundred and no/100--- dollars ($4,300.00)

Payment to be made as follows:

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications creating extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or damage beyond our control. Owner to carry fire, tornado and other necessary insurance. Our workers are fully covered by Workmen's Compensation Insurance.

Authorized Signature: (Signed)_____

Note: This proposal may be withdrawn by us if not accepted within _____.

ACCEPTANCE OF PROPOSAL--The above prices, specifications, and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date of Acceptance: 12/31/75

Signature: Rainey Bros. Co.

Signature: Tracy Rainey

EXHIBIT I

CITY OF MEMPHIS
BUILDING DEPARTMENT
125 N. Main - Room 401-Phone 576-2560

OK	Rej	USE	Address 5261 Helene
		NEW	Date 12/24/75
		REP	Remarks
		REM	
X		ACC	OK 2 UNITS
		RES	
		COM	
		IND	

Signed S/Craig
City Building Inspector

* * * *

CITY OF MEMPHIS
PLUMBING DEPARTMENT
125 N. Main - Room 422 - 527-6611-Sta. 344

OK	Rej.	Address 5261 Helene	Date
X		Remarks	12-22-75
		SLAB ONLY	
ROUGH			

S/ C L Wenkler
City Plumbing Inspector

* * * * *

CITY OF MEMPHIS
BUILDING DEPARTMENT
125 N. Main - Room 401-Phone 576-2560

OK	Rej	USE	Address 5261 Helene
X		NEW	Date 5/30/75
		REP	Remarks
		REM	35' Set Back
		ACC	
		RES	
		COM	
		IND	

Signed S/Craig

City Building Inspector

* * * *

Original Permit No. 12254 SIDEWALK PERMIT
Office of City Engineer
Issued 12/13/1975

Permission is hereby granted to Rainey Bros.
to law___repair___driveway___sidewalk___on _____
side of _____Street/Avenue/Place
between _____Street/Avenue/Place and
_____Street/Avenue/Place Known as
House Number 5261 Helene Street/Avenue/Place
Owner or Agent _____
Total area of wall 400 @ .06 Sq. Ft. Heavy X Light
_ Received 24.00 For City of Memphis Div. of Public Works

By (Signed)

By _____Sidewalk Inspector
Inspected _____ 19____

EXHIBIT H

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE FIFTEENTH JUDICIAL CIRCUIT
AT MEMPHIS

RAINEY BROS. CONSTRUCTION COMPANY, INC.,
Petitioner

vs. No. 53654RD

MEMPHIS & SHELBY COUNTY BOARD OF ADJUSTMENT, Composed of: RUFUS JONES; MRS. T. KYLE CRESON, JR.; ROBERT KNAPP; JOHN F. PALMER; JERRY E. TAYLOR; CARY WHITEHEAD; BARNEY GOLDING; JOHN S. SHEPHARD; and the CITY OF MEMPHIS, a Municipal Corporation; and the CITY OF MEMPHIS BUILDING DEPARTMENT,
Defendants.

PETITION FOR CERTIORARI, SUPERSEDEAS, INJUNCTION AND OTHER RELIEF

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE:

Your petitioner would respectfully show to the Court as follows:

1. That petitioner Rainey Bros. Construction Company, Inc. is a corporation formed under the laws of the State of Tennessee and does business in Memphis, Shelby County, Tennessee, and is an owner of a tract of land known as 5261 Helene, which comprises approximately 13 acres. The subject property is bounded on the south by the Interstate 240, on the north by Helene Avenue and the East Memphis Catholic Club, Inc., on the west side by Vera Cruz Street and on the

east side by residential houses that face away from the subject property.

2. That the defendant Memphis and Shelby County Board of Adjustment (hereinafter referred to as the Board) and the individual members thereof named in the caption, are purporting to act under Ordinance No. 722, a join Ordinance of the City of Memphis and the County of Shelby adopted June 2, 1970, effective July 1, 1970, which appears at Sections 28-28.1 through 28-28.15 in the Code of Ordinances of the City of Memphis and further acts under Section 28-105 of the Ordinances of the City of Memphis and Section 143 through 153 of the Charter and Related Laws of the City of Memphis. That defendant City of Memphis is a municipal corporation and defendant City of Memphis Building Department is a department of the City of Memphis.

3. That on or about August 27, 1975, the Memphis and Shelby County Board of Adjustment acting upon a request for an interpretation of a condition of the previous application on the subject property, ruled that the subject property need not be filled to a previous elevation of 274.9 msl but only had to be filled to an elevation 270 msl as recommended by the City of Memphis Engineering Department. A copy of the official disposition notice and the letter from the City of Memphis Engineering Department is attached hereto and made a part hereof as Exhibit A & B.

4. That on or about September 5, 1975, a letter was forwarded to the Honorable William Walsh, attorney representing Charles Glankler and others from Mr. Frank M. Bosak, building official, indicating that the Board had acted and reduced the elevation from 274.9 to 270 msl at the August 27, 1975 meeting. Copy of letter attached hereto as Exhibit C. In response to this letter, the Honorable William Walsh on behalf of Charles Glankler and others forwarded to Mr. Frank M. Bosak, building official of the City of Memphis, on September 11, 1975 a letter stating their opposition to said opinion. A copy of said letter is attached hereto and made a part hereof as Exhibit D.

5. That on or about April 7, 1976, some seven months after the official disposition of the case, a letter was forwarded to Mr. Robert Stacey, Secretary of the Memphis and Shelby County Board of Adjustment, objecting to the Board's action, a copy of which is attached hereto and made a part hereof as Exhibit E. That the Board apparently acting on this correspondence on April 28, 1976, some eight months after the official disposition of the matter, rescinded the action of August 27, 1975 and reinstated the 274.9 msl elevation. A copy of the official disposition notice is attached hereto and made a part hereof as Exhibit F.

6. That on or about May 25, 1976, prior to the next regular meeting of the Memphis and Shelby County Board of Adjustment which occurred on May 26, 1976, a petition for reconsideration was filed with the Board setting forth the petitioner's position of the great harm and damage that had been done to it by this action some eight months after the official action of the Board on August 27, 1975. A copy of the petition for reconsideration is attached hereto and made a part hereof as Exhibit G. That on information received from the Board office the Board refused to reconsider its action on May 26, 1976.

7. That petitioner would respectfully show to the Court that in reliance upon the Board's action it failed to begin construction or make contracts for a period of approximately sixty days awaiting to see if the Board's action would be appealed by any aggrieved party as required under Section 149 of the Charter and Related Laws of the City of Memphis which states as follows:

> Section 149. Same--Certiorari to circuit court from decision of board--Generally.
>
> Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any officer, department, board or bureau of the municipality, may present to the circuit court a petition, duly verified, setting forth that such

decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board.

That petitioner would show to the Court that if there are persons jointly or severally aggrieved by any decision of the Board of Adjustment, that they should file a petition for certiorari with the Circuit Court and the petition should be presented to the Court within thirty days after the filing of the decision in the office of the Board. Petitioner would state to the Court that that action was not taken and to your petitioner's great prejudice.

8. That your petitioner would state to the Court that in reliance upon the Board's action that it has taken out permits as required by the City of Memphis and has engaged an engineer for finalization of plans and the obtaining of the approval of the City Building Department. A copy of said permits is attached hereto and made a part hereof as Exhibit H. It has secured releases from first mortgage holders in reliance upon the Board's action and has made arrangements for construction financing. Further your petitioner would respectfully show that it has had the sewer plans revised and obtained plumbing permits, constructed the slabs and other type of constructions on the subject property and in fact is well into the framing stage of construction. It has contracted with numerous materialmen, engineers, plumbers and suppliers for the furnishing of services and materials for said contracts still in full force and effect against your petitioner, all of said action was done in reliance to the Board of Adjustment's action on August 27, 1975. A copy of the plumbing contract is attached hereto and made a part hereof as Exhibit I.

9. That on or about May 13, 1976, your petitioner received a letter from Frank M. Bosak, building official of the City of Memphis, informing your petitioner of the Board's action and stating that the requirement of 274.9

msl must be met. This would require that all construction done in reliance to the Board's action will have to be replaced, all to petitioner's great harm.

10. That your petitioner would respectfully show to the Court that it is an aggrieved person by the decision of the Board of Adjustment in rescinding its action and that the decision of the Board is illegal, arbitrary, capricious and without jurisdiction.

PREMISES CONSIDERED, PETITIONER PRAYS:

1. That proper process issue and be served upon the defendants.

2. That a writ of certiorari issue from this Honorable Court, directing the defendant Board to certify and produce before this Court a complete transcript of all proceedings in regards to the action of the Board on August 27, 1975 and all subsequent action of the Board.

3. That at a hearing of this cause, the Court find that the action of the defendant Board on April 28, 1976 be ruled illegal, arbitrary and capricious and without jurisdiction. That a write of supersedeas or injunction be issued by this Honorable Court superseding the action of the defendant Memphis and Shelby County Board of Adjustment as to their action of April 28, 1976 and that the defendant City of Memphis and the City of Memphis Building Department be enjoined from preventing the enforcement of this action, and that the Court take all further action or proceeding it deems necessary.

4. That the petitioner have such other, further and general relief to which it may be entitled in the premises and as the proof may show to be necessary and the circumstances require.

THIS IS THE FIRST APPLICATION FOR WRIT OF CERTIORARI AND SUPERSEDEAS OR OTHER EXTRAORDINARY RELIEF IN THIS CAUSE.

FARRIS, HANCOCK, GILMAN,
BRANAN & LANIER

By S/Homer Branan

Attorneys for Petitioner
1620 First National Bank Bldg.
Memphis, Tennessee 38103

523-8080

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Tracy Rainey, President of Rainey Bros. Construction Company, make oath in due form of law that he is the President of Rainey Bros. Construction Company, Inc., the petitioner in the foregoing petition, and that the statements in the foregoing petition are true to the best of his knowledge, information and belief and that he believes them to be true.

RAINEY BROS. CONSTRUCTION COMPANY, INC.

By S/ Tracy Rainey, Pres
Tracy Rainey, President

Sworn to and subscribed before me this 27 day of May, 1976.

S/ David E. Bales
Notary Public

My Commission Expires:
4/14/80

F I A T

TO THE CLERK OF THE CIRCUIT COURT
OF SHELBY COUNTY, TENNESSEE:

Upon the filing of the foregoing Petition, Petitioners have given bond and security for costs according to law, issue a Writ of Certiorari as prayed for.

THIS 27 day of May, 1976.

S/ Greenfield Polk
Judge

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE FIFTEENTH JUDICIAL CIRCUIT AT
MEMPHIS

RAINEY BROS. CONSTRUCTION
COMPANY, INC.,

Petitioner,

vs.

No. 73473 T.D.-8

THE CITY OF MEMPHIS, A Municipal
Corporation, and THE CITY OF
MEMPHIS BUILDING DEPARTMENT,
MEMPHIS AND SHELBY COUNTY BOARD
OF ADJUSTMENT,

Defendants.

AMENDED COMPLAINT

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE:

Comes now your petitioner and would respectfully show to the Court as follows:

1. That the petitioner Rainey Brothers Construction Company, Inc., is a corporation formed under the laws of the State of Tennessee and does business in Memphis and Shelby County and is the owner of a certain fourteen (14) acre tract of land located at Helene and Vera Cruz known as 5261 Helene in Memphis, Shelby County, Tennessee. The subject property is bound on the south by the Interstate 240, on the north by Helene Avenue and the East Memphis Catholic Club, Inc., on the west by an open concrete lined ditch which itself is obscured with large trees and undergrowth, all being 150 feet east of Vera Cruz Street and on the east side by residential houses that face away from the subject property.

2. That the Defendant City of Memphis is a municipal corporation and the Defendant City of Memphis Building Department is a Department of the City of Memphis. That the Defendant Memphis and Shelby County Board of Adjustment (hereinafter referred to as the Board) and the individual members thereof named in the caption (an agent and agents of the City of Memphis), purported to act under Ordinance No. 722, a joint Ordinance of the City of Memphis and the County of Shelby adopted June 2, 1970, effective July 1, 1970, which appears at Sections 28-28.1 through 28-28.15 in the Code of Ordinances of the City of Memphis and further acted under Section 28-105 of the Ordinances of the City Memphis and Section 143 through 153 of the Charter and Related Laws of the City of Memphis.

3. That on January 6, 1964, Tracy Rainey, President of Rainey Brothers Construction Co., Inc., contacted public officials of the City of Memphis and was assured that there would be no problems with subdividing the Vera Cruz/Helene land and building single family homes on the property. On January 8, 1964, Plaintiff, Rainey Brothers Construction Co., Inc., purchased 2.7 acres of vacant land situated west of an open ditch, on said property. Further, Plaintiff took option to purchase 14 acres east of the ditch on January 8, 1964.

That Rainey Brothers Construction Company presented a preliminary plan to public officials on February 3, 1964, and was told that the minimum curb elevation had been increased to 269 msl. This raising in the elevation level made it economically unfeasible to build single family homes. Thus, on March 19, 1964, Rainey Brothers Construction Co., asked the Planning Commission for apartment zoning for 432 units, of (2) two story apartments which was rejected by the Planning Commission for the City of Memphis. On appeal, the decision of the Planning Commission was affirmed by the City Commission.

4. That on June 19, 1964, the East Memphis Catholic Club leased and contracted to purchase Twin Oaks Club House and 1.58 acres adjacent to the property owned by the Plaintiff. East Memphis Catholic Club also contracted to purchase the 14 acres that Plaintiff had under option, assuming that the Plaintiff did not exercise the option. On March 23, 1965, Rainey Brothers Construction Co., exercised its option for the

purchase of the aforementioned 14 acres. Also, on the same date, East Memphis Catholic Club purchased the aforementioned 1.58 acres. That in September, 1965, the Planning Commission rejected townhouse zoning, and in October, 1965, upon appeal by the City Commission rejected townhouse zoning.

That on April 6, 1967, the Planning Commission approved R-3A zoning for 244 apartments, and the City Commission declined to act upon appeal on May 30, 1967. The City Commission did not make a record of its proceedings at the May 30, 1967 hearing. Further, the City Commission did not require that a vote be taken on this proposal, although the City Attorney and previously had advised the Commission to have a vote. On December 26 and 27, 1967, the City Commission approved R-3A zoning for 244 apartments on the property.

That on January 2, 1968, Mayor Henry Loeb stopped the permit. Plaintiff applied to the City Building Department for a permit on January 2, 1968, but was rejected. On Jnuary 25, 1968, The Board of Adjustment rejected to hear the appeal for the "Group Apartments". On February 28, 1968, the Board rejected "Group Apartments". On June 6, 1968, a decision of the Chancery Court overturned the approval by the City Commission. See E. L. Wheeler and Grady Pyron v. City of Memphis, etc. Chancery Court No. 70980-3.

5. That on October 2, 1969, Rainey Brothers Construction Co., asked the Board of Adjustment

for permission to construct 165 apartments. On December 22, 1969, The Board of Adjustment approved construction of 165 apartments at an elevation level of 274.9. Mayor Loeb expressed opposition and requested reconsideration by The Board of Adjustment. On February 25, 1970, The Board of Adjustment reaffirmed their approval. On February 27, 1970, Mayor Loeb met with objectors and discussed plans to appeal to Circuit Court.

On June 8, 1972 the Tennessee Supreme Court held that The Board of Adjustment had authority to issue a Hardship variance for apartments. The elevation level of 274.9 was never considered.

6. On June 8, 1973, Plaintiff, Rainey Brothers Construction Company secured a building permit, having relied on the opinion of the Supreme Court. This permit was extended by the City of Memphis Building Department and remained active. The Building Official of The City of Memphis Building Department, Frank Bosak notified the objectors through their Attorney, William Walsh that Rainey Brothers Construction Company was asking ~~The~~ Board of Adjustment to lower the building elevation on August 27, 1975.

7. That on or about August 27, 1975 the Memphis and Shelby County Board of Adjustment, (hereinafter known as Board) a quasi-judicial administrative body operating under the laws of the City of Memphis acted upon certain information from the City of Memphis Engineering Department and upon correspondence from

the petitioner Rainey Brothers Construction Company, Inc., and lowered the fill elevation on the property owned by petitioner from 274.9 msl to an elevation level of 270 msl. A copy of the official disposition notice is attached hereto and made a part hereof as Exhibit A.

8. That the official disposition notice of the Board's interpretation was dated August 29, 1975 and was received by Plaintiff Rainey Brothers Construction Company, Inc., on or about August 30, 1975. That on or about September 5, 1975, some several days after the Board had ruled that the elevation level would be 270 msl, Frank M. Bosak, Building Official of the City of Memphis Building Department informed the Honorable William Walsh, the attorney representing certain objectors including Charles Glankler of the Board's ruling. A copy of the letter is attached hereto as Exhibit B. That on or about September 11, 1975 the Honorable William M. Walsh responded to said letter to Frank M. Bosak, Building Official of the City of Memphis Building Department, by indicating that he objected to the reduction of the elevation level from 274.9 msl to 270 msl. A copy of the letter is attached hereto as Exhibit C.

That your petitioner Rainey Brothers Construction Company, Inc., waited more than sixty (60) days from the final action of the Board on August 27, 1975 to see if an appeal would be filed as provided in the City charter of the City of Memphis and the statutes of the State of Tennessee; no appeal was filed. That your petitioner in reliance upon the Board's ruling took out

necessary permits along with employing engineers, material men, suppliers, and plumbers, in furtherance of the construction of certain buildings on the subject property. That your petitioner had obtained releases from the first mortgage and obtained a commitment for the construction of said buildings, all said actions in reliance upon the Board's decision of August 27, 1975.

That your Petitioner, Rainey Brothers Construction Company, Inc., relying upon the approval by the Board also obtained approvals from the City Plumbing Department and had sewer plans revised and obtained a plumbing permit. That inspections were made by the City of Memphis Building Department of the slab construction which was approved. The slabs were placed in position after receiving said approval and in fact construction was well into the framing stages when the Board acted on April 28, 1976.

That your petitioner would show to the Court that on April 7, 1976 some seven months after the Board's action of August 27, 1975, of reducing the elevation level, William M. Walsh, Attorney representing the objectors sent a correspondence to the Memphis and Shelby County Board of Adjustment. A copy of said letter is attached hereto as Exhibit D. That on April 28, 1976 some eight months after the Board's action of August 27, 1975 the Memphis and Shelby County Board of Adjustment rescinded its action thereby causing your petitioner grievous and serious damages. A copy of the official disposition notice is attached hereto and made a part thereof as Exhibit E.

That following the Board's actions of April 28, 1976 the City of Memphis Building Department forwarded to your petitioner a copy of the official disposition notice and informed petitioner that the elevation which the petitioner had been relying on for the past eight months had been changed which would cause your petitioner to have to tear down the construction heretofore completed and build to the 274.9 elevation, all to its great detriment.

9. Plaintiff, Rainey Brothers Construction Company petitioned for a rehearing at the next scheduled meeting of The Board of Adjustment which was scheduled for May 26, 1976. The request was denied by the Board of Adjustment of Memphis and Shelby County, Tennessee. The Building Official of the City of Memphis cancelled the permit on September 30, 1976.

10. That Defendants City of Memphis and Memphis and Shelby County Board of Adjustment did not adhere to the Charter of the City of Memphis which requires that an objector to the Board's action file an appeal within thirty (30) days. The section states as follows:

> Section 149. Same -- Certiorari to Circuit Court from decision of board ---- Generally.
>
> Any person or persons, jointly or severally, aggrieved by any

> decision of the board or bureau of the municipality, may present to the Circuit Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty (30) days after the filing of the decision in the office of the board. (Priv. Acts 1925, ch. 428, Sec. 1)

By not denying the objections on the grounds of untimely filing, the Defendant City of Memphis and Defendant Board of Adjustment caused your Petitioner great damages.

11. That your Petitioner Rainey Brothers Construction Company, Inc., would show to the Court that its due process rights under the 5th and the 14th Amendments of the U.S. Constitution and Article I, Section 21 of the Tennessee Constitution were violated, since his vested property interests were damaged by the subsequent actions of the Board in raising the elevation level. Petitioner avers that the Board of Adjustment was estopped by its previous action of August 27, 1975.

12. That your Petitioner, Rainey Brothers Construction Company, Inc., is prepared to show that the actions of the Defendants alleged in this Complaint, denied the Petitioner all economically viable use of the

property, that his property rights were damaged, and thus a "taking" as defined by T.C.A. 29-16-123, had occurred. Further, the action of the Board, was not for legitimate public use, and just compensation was not paid to the Plaintiff as required by Article I, Section 21 of the Tennessee Constitution, the Fifth Amendment to the U.S. Constitution, and T.C.A. 29-16-123, and the due process and equal protection clauses of the l4th Amendment of the U.S. Constitution. Further, the actions of the Defendants violated Plaintiff's civil rights under 42 U.S.C. 1983, 42 U.S.C. 1985 and 42 U.S.C. 1988. By forcing the Plaintiff to bring numerous cubic yards of dirt to comply with the Board's subsequent ruling, the Plaintiff's rights were seriously impaired, and its distinct investment backed expectations were destroyed. Plaintiff's property rights were taken and damaged and just compensation was not paid.

That your petitioner Rainey Brothers Construction Company, Inc., would show to the Court that in the hiring of all of the parties hereinabove mentioned and the purchase of material and other expenses, he become insolvent and experienced great financial losses in reliance upon the Board's actions.

WHEREFORE, the petitioner alleges that it has been damaged to its great detriment in an amount which the Court deems reasonable at the trial of this cause said compensable damage being Seventy Three Million ($73,000,000.00).

WHEREFORE, the petitioner alleges that the actions of the Defendants were malicious, intentional, reckless, and with callous indifference, and thus punitive damages may be awarded in the amount of Fifty Two Million Dollars ($52,000,000.00).

WHEREFORE, PETITIONER PRAYS:

1. That this being the first amended application for relief in this cause, that a Writ of Certiorari and Supersedeas be issued requiring Defendants to certify and produce to the Court a complete transcript of all proceedings in regard to each complaint or claim involved in this petition. That the proper process be issued and served upon the Defendants and that they be required to answer.

2. That at the trial of this cause, your petitioner be awarded such damages as deem reasonable said damages not to exceed One Hundred Twenty Five Million Dollars ($125,000,000.00), plus the cost of this cause.

3. That the Court declare that inverse condemnation of Plaintiff's real property has taken place and a judgment be rendered against the Defendants for the loss of the use of the property, plus interest, loss of appreciation and profit, attorneys fees, and other expenses which were incurred in bringing this suit and in exhausting the Petitioner's administrative remedies.

4. That the Court award the Plaintiff, Rainey Brothers Construction Company interest on any judgment obtained in this matter, payable from the time of March 19, 1964.

5. That the Court award the Plaintiff, Rainey Brothers Construction Company, loss of appreciation, and profits, and other losses, including punitive damages for the loss of the value of the land during the period of the taking.

6. That the Court award Plaintiff, all attorneys fees, which he has incurred in exhausting his remedies as well as bringing this action, pursuant to 42 U.S.C. Section 1988.

7. That the petitioner have such other, further and general relief as it may be entitled to upon the trial of this cause.

Respectfully submitted,

AGEE, KIM & PHELAN

S/ Ronald W. Kim by Alex Saharovici
Ronald W. Kim,
Attorney for the Petitioner
6263 Poplar Avenue
Suite 101
Memphis, Tennessee 38119
(901) 767-3520
D. N. 9060

STATE OF TENNESSEE

COUNTY OF SHELBY

I, Tracey Rainey, being first duly sworn, makes oath that the facts stated in the foregoing Amended Complaint are true and the complaints made therein are not made out of levity, or by collusion with the Defendant, but in sincerity and truth for the causes mentioned therein, and, to the best of my knowledge, information, and belief, I am justly entitled to the relief sought.

S/ Tracy Rainey, Pres
Rainey Bros. Const Co. Inc.

Subscribed and sworn to before me this 14th day of November, 1988.

S/ Patsy R. Jackson
Notary Public

My Commission Expires:
My Commission Expires June 2, 1992

Service of copy of complaint accepted.

_____

_____

Date

rainey.txt

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing amended complaint on counsel of record for all parties at interest in this cause by placing a copy of the same in the United States Mail, postage prepaid, and addressed to the City Attorney, Mr. Clifford Pierce, Attorney At Law, City Attorney's Office, 314 City Hall, 125 North Mid-America Mall, Memphis, Tennessee 38103.

This 14th day of November, 1988.

AGEE, KIM & PHELAN

BY: S/ Alex Saharovici

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE FIFTEENTH JUDICIAL CIRCUIT
AT MEMPHIS

RAINEY BROTHERS CONSTRUCTION COMPANY INC., AND TRACY RAINEY, INDIVIDUALLY,

Petitioner,

vs. No. 73473-8 T.D.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT; RUFUS JONES; MRS. T. KYLE CRESON, JR.; ROBERT KNAPP; JOHN F. PALMER; JERRY E. TAYLOR; CARY WHITHEAD; BARNEY GOLDING; JOHN S. SHEPARD; AND EACH, INDIVIDUALLY; AND THE CITY OF MEMPHIS, A MUNICIPAL CORPORATION; AND THE CITY OF MEMPHIS BUILDING DEPARTMENT,

Defendants.

SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE:

Comes now your petitioner and would respectfully show to the Court as follows:

1. That the petitioner Rainey Brothers Construction Company, Inc., is a corporation formed under the laws of the State of Tennessee and does business in Memphis and Shelby County and was from 3/23/65 until 11/5/76, the owner of a certain fourteen (14) acre tract of land located at Helene and Vera Cruz known as 5261 Helene in Memphis, Shelby County, Tennessee. Tracy Rainey has been president of Rainey Brothers Construction Company, Inc. 1021/55, and resides at 5347 Knollwood Drive, Memphis, Tennessee 38119. The subject property is bound on the south by the Interstate 240, on the north by Helene Avenue and the East Memphis Catholic Club, Inc., on the west by an open concrete lined ditch which itself is obscured with large trees and undergrowth, all being 150 feet east of Vera Cruz Street and on the east side by residential houses that face away from the subject property.

2. That the Defendant City of Memphis is a municipal corporation and the Defendant City of Memphis Building Department is a Department of the City of Memphis. That the Defendant Memphis and Shelby County Board of Adjustment (hereinafter referred to as the Board) and the individual members thereof named in the caption (an agent and agents of the City of Memphis, acting within the scope of their agencies), purported to act under Ordinance No. 722, a joint Ordinance of the City of Memphis and the County of Shelby adopted June

2, 1970, effective July 1, 1970, which appears at Sections 28-28.1 through 28-28.15 in the Code of Ordinances of the City of Memphis and further acted under Section 28-105 of the Ordinances of the City Memphis and Section 143 through 153 of the Charter and Related Laws of the City of Memphis.

3. That on January 6, 1964, Tracy Rainey (all references to Plaintiff, Petitioner or Rainey Brothers Construction Company, Inc., shall include Tracy Rainey, individually, when appropriate and hereinafter referred to as Rainey Brothers), President of Rainey Brothers Construction Co., Inc., contacted public officials of the City of Memphis and was assured that there would be no problem with subdividing the Vera Cruz/Helene land and building single family homes on the property. On January 8, 1964, Plaintiff, Rainey Brothers Construction Co., Inc., purchased 2.7 acres of vacant land situated west of an open ditch, on said property. Further, Plaintiff took an option to purchase the above described 14 acres east of the ditch on January 8, 1964.

4. That Rainey Brothers Construction Company presented a preliminary plan to develop single family homes to public officials on February 3, 1964, and was told that the minimum curb elevation had been increased from 267 MSL to 269 MSL since 1/6/64. This raising in the elevation level made it economically unfeasible to build single family homes.

5. Thus, on March 19, 1964, Rainey Brothers asked the Planning Commission for R4 apartment zoning

for 432 units, of (2) two story apartments which was rejected by the Planning Commission for the City of Memphis. On appeal, the decision of the Planning Commission was affirmed by the City Commission.

6. That on June 19, 1964, the East Memphis Catholic Club leased and contracted to purchase Twin Oaks Club House and 1.58 acres adjacent to the property owned by the Plaintiff. East Memphis Catholic Club also contracted to purchase the 14 acres that Plaintiff had under option, assuming that the Plaintiff did not exercise the option. On March 23, 1965, Rainey Brothers exercised its option for the purchase of the aforementioned 14 acres. Also, on the same date, March 23, 1965, East Memphis Catholic Club purchased the aforementioned 1.58 acres.

7. That on September 2, 1965, the Planning Commission rejected townhouse zoning, and in October, 1965, upon appeal by Rainey Brothers, the City Commission rejected townhouse zoning, and affirmed the City Planning Commission's denial.

8. That on April 6, 1967, the Planning Commission approved rezoning of the subject property from single family residential to apartment zoning.

9. That the City Commission acting under Ordinance 374 effective 5/31/55, Sections 1892 through 1919, inclusive, and Ordinance 737, declined to act upon Rainey Brothers application for R4A apartment zoning on May 30, 1967. Rainey Brothers was not heard, allowed

to present evidence, rebut or cross examine witnesses, pertaining to ex parte contacts. Ex parte contacts were not a part of the record; the Commission's decision was resolved prior to the meeting; the Commission's action was not based upon substantial, competent, or material evidence, or, testimony adduced at the hearing; the actions and conduct of the defendants were intentional, malicious, reckless, arbitrary, capricious, and done in conscious disregard for the rights of Rainey Brothers to a fair hearing and entitlement to procedural due process protections which right is absolute, without regard to any actual injury to Rainey Brothers. Further, the City Commission did not require that vote be taken on this proposal, although the City Attorney had previously advised the Commission to take a vote. This effected a taking, especially contrary to the U. S. Constitution's 5th Amendment due process and just compensation clauses(1), the 14th Amendment's due process and equal protection law clauses(2), and the Tennessee Constitution's Atricle I, Section 21 (Just compensation)(3), Article I, Section 8 (Deprivatons to benefit other)(4), Article XI, Section 8 (Favors to benefit others)(5) and T.C.A. 29-16-123. (inverse condemnation)(6).

10. That on December 26 and 27, 1967, the City Commission, acting under Ordinance 374 effective 5/31/55, Sections 1892 through 1919 inclusive and Ordinance 737 approved R3A zoning for 244 apartments on the property to become effective December 29, 1967. See Footnote 1 on Page 20 - See Footnotes 2,3,4 and 5 on Page 21 - See Footnote 6 on Page 22.

11. That on January 2, 1968, in reliance upon the City Commission's approval of the R3A zoning request, Rainey Brothers applied to the City Building Department for a building permit. On January 2, 1968, Mayor Henry Loeb instructed the City Building Department not to issue a building permit to Rainey Brothers for construction of the 244 apartments on the Subject Property and Rainey Brothers' building permit application was rejected. The issuance of a building permit is a ministerial act and the City Building Department acted wrongly in declining or refusing to issue a building permit to Rainey Brothers, and the Mayor had no authority or legal basis to order the Building Department not to issue a building permit to Rainey Brothers.

12. That on 1/16/68, the Building Official, without authority, notified Rainey Brothers the City would not issue a building permit to construct apartments on Rainey Brothers' Helene property.

13. That on January 25, 1968, the Board of Adjustment rejected to hear the appeal for "Group Apartments", although no suit had been filed, and there was no other legitimate reason. On February 28, 1968, the Board rejected Group Apartments, although the statute of limitations was complete as to the December 26 and 27, 1967, hearing prior to the filing of a suit in Chancery Court, #70980-3) in February, 1968, and same was protected by the First Amendment to the U. S. Constitution, Section 10 (Obligation to contracts),(7), and the Tennessee Constitution Article I, Section 20(8),

(obligation to contracts and time limitation), and Article XI, Section 8 (Vested property right), Article I, Section 21 (Just [See Footnotes 7 and 8 on Page 23.] Compensation), and T.C.A. 29-16-123 (Inverse Condemnation): automatically and immediately activating protection of the due process clauses of the 5th and 14th Amendments and the equal protection clause of the 14th Amendments of the U. S. Constitution and just compensation clause of the 5th.

14. That on June 27, 1968, a decision of the Chancery Court, without jurisdiction, overturned the approval by the City Commission, see E. L. Wheeler and Grady Pyron v. City of Memphis, Chancery Court No. 70980-3, even though the statute of limitation was complete as to the December 26 and 27, 1967, hearing and Rainey Brothers had a vested property right protected by the First Amendment to the United States Constitution, Section 10 (Obligation to contract) and the Tennessee Constitution, Article I, Section 20) Contracts and time limitations) and by the due process clauses of the 5th and 14th Amendments of the U. S. Constitution and just compensation clause of the 5th.

15. That on October 2, 1969, Rainey Brothers asked the Board of Adjustment for permission to construct 165 apartments. On December 22, 1969, the Board of Adjustment approved construction of 165 apartments at an elevation level of 274.9. Mayor Loeb expressed opposition and requested reconsideration by the Board of Adjustment. On February 25, 1970, the Board of Adjustment reaffirmed their approval of December 22,

1969, over Mayor Loeb's objection. On February 27, 1970, Mayor Loeb met with objectors and discussed both their serious needs and personal preferences and plans to appeal to Circuit Court.

16. That on June 8, 1972, the Tennessee Supreme Court held that the Board of Adjustment had authority to issue this hardship Variance for apartments. The elevation level of 274.9 was never considered.

17. That on June 8, 1973, Rainey Brothers secured a building permit, having relied on the opinion of the Supreme Court. This permit was extended by the City of Memphis Building Department and remained active. The Building official of the City of Memphis Building Department, Frank Bosak, notified the objectors through their attorney, William Walsh, that Rainey Brothers was asking the Board of Adjustment to lower the building elevation on August 27, 1975.

18. That on or about August 27, 1975, the Memphis and Shelby County Board of Adjustment, (hereinafter known as the Board), a quasi-judicial administratiVe body, operating under the laws of the City of Memphis, acting upon certain information from the City of Memphis Engineering Department and upon correspondence from the Petitioner, Rainey Brothers, and lowered the fill elevation on the property owned by the Petitioner from 274.9 MSL, to an elevation level of 270 MSL. A copy of the official disposition notice is attached hereto as Exhibit A.

19. That the official disposition notice of the Board's interpretation was dated August 29, 1975, and was received by Plaintiff, Rainey Brothers, on or about August 30, 1975. That on or about September 5, 1975, some several days after the Board had ruled that the elevation would be 270 MSL, Frank M. Bosak, Building Official of the City of Memphis Building Department, informed the Honorable William Walsh the attorney representing certain objectors, including Charles Glankler, of the Board's ruling. A copy of the letter is attached hereto as Exhibit B. That on or about September 11, 1975, The Honorable William M. Walsh responded to said letter from Frank M. Bosak, Building Official of the City of Memphis Building Department, that he objected to the reduction of the elevation level from 274.9 to 270 MSL. A copy of the letter is attached hereto as Exhibit C.

20. That your petitioner, Rainey Brothers, waited more than sixty (60) days from the final action of the Board, on August 27, 1975, to see if an appeal would be filed as provided in the City Charter of the City of Memphis and the statutes of the State.of Tennessee; no appeal was filed. That your Petitioner, in reliance upon the Board's ruling, took out the necessary permit, along with contracting engineers, material, men, suppliers, and plumbers, in furtherance of the construction of certain buildings, all said actions in reliance upon the Board's decision of August 27, 1975.

21. That your petitioner, Rainey Brothers, relying upon the approval by the Board, also obtained approvals from the City Plumbing Department and had

sewer plans revised and obtained a building permit. That inspections were made by the City of Memphis Building Department of the slab construction, which was approved. The slabs were placed in position financing; construction was well into the framing stages when the Board acted on April 28, 1976.

22. That your petitioner would show to the Court that on April 7, 1976, some seven months after the Board's action of August 27, 1976, of reducing the elevation level, William M. Walsh, attorney representing the objectors, sent a correspondence to the Memphis and Shelby County Board of Adjustment. A copy of said letter is attached hereto as Exhibit D.

23. That on April 28, 1976, some eight months after the Board's action of August 27, 1975, the Memphis and Shelby County Board of Adjustment rescinded its action, thereby causing your petitioner grievous and serious damages. A copy of the official disposition notice is attached hereto and made a part thereof as Exhibit E.

24. That following the Board's actions of April 28, 1976, the City of Memphis Building Department forwarded to your petitioner a copy of the official disposition notice and informed petitioner that the elevation which the petitioner had been relying on for the past eight months had been changed, which would cause your petitioner to have to tear down the construction heretofore completed and build to the 274.9 elevation, all to its great detriment.

25. Plaintiff, Rainey Brothers, petitioned for a rehearing at the next scheduled meeting of the Board which was scheduled May 26, 1976. The request was denied by the Board. The Building Official of the City of Memphis cancelled the permit on September 30, 1976.

26. That Defendants, City of Memphis and Memphis and Shelby County Board of Adjustment did not adhere to the Charter of the City of Memphis, which requires that an objector to the Board's action file and appeal within thirty (30) days. The Section states as follows:

> Section 149. Same-----Certiorari to Circuit Court from decision of Board----generally.
>
> Any person or persons, jointly or severally, aggrieved by any decision of the board or bureau of the municipality, may present to the Circuit Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the Court within thirty (30) days after the filing of the decision in the office of the board. (Priv. Acts 1925, Ch. 428, Sec. 1).

By not denying the objections on the grounds of untimely filing, the Defendant City of Memphis and Defendant Board of Adjustment caused your Petitioner great damages.

27. Rainey Brothers is a person aggrieved by the action of the board's rescinding its August 27, 1975, decision to establish the minimum curb elevation to 270.0 MSL and "reinstating" the minimum buildable elevation of the subject property.

28. The April 28, 1976, decision of the Board to rescind its August 27, 1975, interpretation setting the minimum elevation to 270.0 MSL and to "reinstate" the 274.9 MSl requirement was illegal, arbitrary, capricious, and without justification or rational basis. The April 28, 1976, Board decision also exceeded the Board's jurisdiction did not promote any established public purpose and was ultra vires.

29. That your petitioner, Rainey Brothers, would show to the Court that its due process rights under the 5th and 14th Amendments of the U.S. Constitution were violated, and its vested property rights were damaged and taken by subsequent actions of the Board in raising the elevation level. Petitioner avers that the Board was estopped by its previous action on August 27, 1975. Obligations of its contracts, created by the Board's action of 8/27/75, were impaired and vested rights conferred by satisfaction of time limitations were damaged and taken; these actions violated the U.S. Constitution, Article I-10 (obligation of contract), the Tennessee

Constitution, Article XI, Section 8 (vested rights), Article I, Section 20, Tennessee Constitution (contracts and statute of limitations), and Article I, Section 21 (just compensation) and T.C.A. 29-16-123; just compensation of the 5th and equal protection of laws under the 14th U.S. Amendment, Section I.

30. That your petitioner, Rainey Brothers, is prepared to show that the actions of the defendants by use of ex parte contacts, allowing themselves and others, through favoritism, to build below 269 MSL., while denying Rainey Brothers the same privilege is in violation of the Tennessee Constitution, Article XI, Section 8. The action of the Defendants imposed deprivations upon Rainey Brothers in violation of the Tennessee Constitution, Article I, Section 8, and greatly helped defendants and adjoining property owners to hold dominion and control over Rainey Brothers land to your petitioners great detriment; The consequences of the Defendants' action denied Rainey Brothers equal protection of the law (14th Amendment, Section I) and all economically viable use of the property; that its distinct financially backed expectations were destroyed; that its property rights, including the right to build, which confers a vested right, which in turn required independent judgment in decision making, were taken and thus a "taking" occurred as defined by T.C.A. 29-16-123; Further, the due process and equal protection clauses of the 14th Amendment of the U.S. Constitution were denied to Rainey Brothers and the due process clause of the 5th Amendment to the U.S. Constitution were denied to

Rainey Brothers, all under the color of law and just compensation was not paid.

31. The actions and course of conduct of the City and Board, and Defendants, Jones, Creson, Knapp, Palmer, Taylor, Whitehead, Golding and Shepard, and each of them, executed or implemented the policies or customs of the City and Board and may fairly be said to represent official policy of the defendants, City and Board.

32. The decision of the Board on April 28, 1976, and the City Commission on May 30, 1967, is not supported by substantial and material evidence, and the board's decision to rescind its earlier action establishing the building elevation at 270.0 MSL, was without basis or foundation and unrelated to any legitimate governmental interest; said actions were supported by ex parte contacts, which were not made a part of the record nor rebuttal allowed.

33. Rainey Brothers' right to full and fair notice and opportunity to be heard are absolute, notwithstanding the existence of any actual injury to Rainey Brothers.

34. The actions and conduct of Defendants, and each of them, as hereinbefore described, were intentional, malicious, reckless and done in conscious disregard for the rights of Rainey Brothers so as to warrant the imposition of punitive of exemplary damages.

35. Neither the City Charter, nor applicable Tennessee law contemplate or permit the board to consider a challenge or an appeal made, or submitted more than thirty (30) days after a final decision, and therefore, the Board's acceptance, consideration and subsequent action in response to the letter of William Walsh is ultra vires and unauthorized. Furthermore, the submission of a protest "letter", or attorney's opinion letter, does not constitute a proper appeal under the City Charter and should not have been accepted or considered by the Board even had such been timely made or submitted.

36. The consideration of a zoning change for a specific tract of land, such as the Subject Property, is a quasi-judicial function. Owners of property sought to be rezoned have a property interest and a legitimate claim of entitlement to procedural due process protections, which they were denied during 5/30/67 - 4/28/76.

37. Rainey Brothers believes that some or all of the Board members considered the information, through ex parte contacts, relevant to Rainey Brothers' rezoning applications and/or the decision to rescind the Board's actions which were not made part of the record, at which Rainey Brothers was not given an opportunity to rebut, and/or which the Board and/or its individual members could not permissibly and legally consider.

38. Rainey Brothers believes that because of pre-hearing or ex parte contacts with the City, Board and Board members, Rainey Brothers' applications were

not judged or considered by a tribunal impartial in the matter, nor was any decision to deny or rescind based upon substantial, competent or material evidence or testimony adduced at any hearing or proceeding.

39. The actions and course of conduct of the City, Board and Board members (identified hereinbefore], and each of them, deprived Rainey Brothers of its right to procedural due process secured to it by Article I, Section 21, of the Tennessee Constitution, and Rainey Brothers was injured and damaged by such acts and conduct of defendants, and each of them.

40. The actions and conduct of the City and Board, as aforesaid, have so severely limited and restricted the reasonable or viable use of the Subject Property as to damage Rainey Brothers' property rights as to deny Rainey Brothers its reasonable investment-backed expectations and any economically viable use of the Subject Property.

41. By so severely limiting and restricting the use of the Subject Property, and damaging Rainey Brothers' property rights in the subject Property, the City, Board and Board members, and each of them, have taken the Subject Property for public use without formal condemnation proceedings. There is no indication that the City and/or Board intends or is willing to institute and prosecute a formal condemnation to acquire the Subject Property.

42. The City and/or Board have failed to provide Rainey Brothers with just compensation for the Subject Property as required by Article I, Section 21, of the Tennessee Constitution, and Rainey Brothers is, therefore, entitled to damages caused by Defendants "inverse condemnation" under T.C.A. 29-16-123, including interest, loss of profits and appreciation, attorneys' fees and other costs, expenses, payments reimbursements.

43. By virtue of their actions in approving Rainey Brothers applications, petitions, and requests, and, on account of issuing various permits, approvals and licenses in connection with the construction of apartment buildings on the Subject Property at the 270.0 MSL elevation, the City and Board were estopped and otherwise precluded from altering, changing, rescinding or otherwise tampering with such permits, approvals and licenses.

44. Petitioners request that punitive or exemplary damages in an amount so as to punish defendants, and each of them, and to deter them and others from like conduct in an amount, not to exceed Fifty-Two Million Dollars ($52,000,000.00).

45. The actions and course of conduct of defendants, Jones, Creson, Knapp, Palmer, Taylor, Whitehead, Golding, and Shepard, and each of them, executed or implemented the policies or customs of the City and Board and may fairly be said to represent the official policy of the City and Board.

46. The actions and course of conduct of the city and Board and Jones, Creson, Knapp, Palmer, Taylor, Whitehead, Golding and Shepard, and each of them, were under color of law and deprived Rainey Brothers of its right to due process secured by the 14th Amendment to the United States Constitution, in violation of 42 U.S.C. Section 1983.(9) See Footnote #9 on Page 23.

47. As a direct and proximate result of the abovedescribed acts and conduct of defendants, and each of them, Rainey Brothers has suffered and will suffer damages, and has incurred, and will incur, attorneys' fees, which it is entitled to recover pursuant to 42 U.S.C. Section 1988.(10)

48. As a direct and proximate result of the abovedescribed acts and conduct of defendants, and each of them, Rainey Brothers has suffered special damages for option payments, which damages are continuing, and for consultant's fees and other expenses related to the processing of the rezoning application and requests with respect to the building elevation.

49. Rainey Brothers' right to full and fair notice and opportunity to be heard are absolute, notwithstanding the existence of any actual injury to Rainey Brothers.

50. The actions and course of conduct of defendants, City, Board, Jones, Creson, Knapp, Palmer, Taylor, Whitehead, Golding and Shepard, and each of them, were under color of law and deprived Rainey

Brothers of its property without just compensation, contrary to the 5th and 14th Amendments to the United States Constitution, in violation of 42 U.S.C. Section 1983.

51. That your Petitioner, Rainey Brothers, would show to the Court that in the hiring of all of the parties hereinbefore mentioned, the purchase of unproductive land, materials, payment of fees, expenses, real estate taxes, insurance, upkeep, overhead, arranging finances, and countless other outlays of monies, over a protracted [See Footnote #10 on Page 24.] period it became insolvent as a direct result thereof and suffered great financial losses in the form of deeds in lieu of foreclosure, interest rates adjusted upward, debt payments accelerated, and many others, including the witnessing or two of its sister corporations losing all of their assets, which were substantial, through foreclosures and bankruptcy, all to your petitioners great loss and all in reliance upon the defendants actions.

WHEREFORE, the Petitioner alleges that it has been damaged to its great detriment in an amount which the Court deems reasonable at the trial of this cause, said compensable damage being Seventy-Three Million Dollars ($73,000,000.00).

WHEREFORE, the Petitioner alleges that the actions of the defendants were intentional, reckless, and with callous indifference, and/or constituting a civil conspiracy, and thus punitive damages may be awarded in the amount of Fifty-Two Million Dollars ($52,000,000.00).

WHEREFORE PETITIONER PRAYS: for relief against actions of defendants; and each of them, as follows:

(a) An order declaring that Petitioners were deprived of due process of the 5th and 14th Amendments; just compensation under the 5th Amendment, Article I, Section 21, of the Tennessee Constitution, and T.C.A. 29-16-123; equal protection of the law under the 14th Amendment; obligations of contracts and vested property rights and statute of time limitation rights under the U.S. Constitution, Article I-10 (Obligation of Contract) and the Tennessee Constitution, Article XI, section 8 (vested rights, Article I, Section 20 (contract and time limitations); Article I, section 8 (Deprivations to benefit others); all contrary to protection afforded same by the 14th Amendment's due process clause; vested property rights secured by expenditure of money, materials and making of contracts and liabilities and guaranteed by the 14th Amendment's due process clause and the First Amendment's (Section 10) obligation to contracts clause; estoppel against defendants secured through defendants' previous action of 8/27/75; the Tennessee Constitution, Article I, Section 8 and Article XI, Section 8. Article I, Section 20; protection against ultra vires actions; constitutional property right to build, and vested property rights therein; property right to maintain reasonable dominion and control over its land resulting from illegal interference from defendant; constitutional rights under color of law in violation of 42 U.S.C. Section 1983; any and all other rights and claims as set forth in the foregoing petition and amendments thereto.

(b) General and special damages in the amount of Seventy-Three Million Dollars ($73,000,000.00), as a result of the deprivation of Petitioners' rights;

(c) Just compensation for the loss of the value of the use of Petitioners' property, including fair market rental value, loss of profit and appreciation on the reasonably feasible and economically viable use, distinct financially backed expectations to construct, and permanently own, maintain, possess and enjoy financial rewards and security therefrom of 165 townhouses and apartments, plus ten percent interest per annum, compounded annually on any accrued, unpaid balance, starting 3/19/64, until paid;

(d) Punitive or exemplary damages in an amount not to exceed Fifty-Two Million Dollars ($52,000,000.00);

(e) Reasonable attorneys' fees pursuant to 42 U.S.C. Section 1988;

(f) Attorneys, consultants, appraisers, and expert witnesses fees, expenses and reimbursements and costs of this action and preceding actions which had exhausted petitioners' remedies and secured a final administrative (quasi-judicial) determination, all pursuant to the 14th and 5th Amendments to the U.S. Constitution, Article I, Section 21, of the Tennessee Constitution, and T.C.A. 29-16-123;

WHEREFORE, PETITIONER PRAYS FURTHER:

1. That this being the second amended application for relief in this cause, that a Writ of Certiorari and Supersedeas be issued requiring Defendants to certify and produce to the Court a complete transcript of all proceedings in regard to each complaint or claim involved in this petition. That the proper process be issued and served upon the defendants and that they be required to answer;

2. That at the trial of cause, your Petitioner be awarded such damages as deemed reasonable, said damages not to exceed One Hundred Twenty-Five Million Dollars ($125,000,000.00), plus costs, fees and expenses;

3. That the Petitioner be awarded special damages for option payments, with interest, which damages and interest is continuing;

4. That the Court issue a mandatory injunction requiring Defendants to permanently restore the minimum building elevation to either 267.0 MSL, or not more than 270.0 MSL, and rezone the 14 acres, R4A, as requested of the City Commission on May 30, 1967, and to issue all permits, licenses and approvals to Rainey Brothers, or his designated successor owner, upon request, without time limitation or penalty; or as first alternate, issue all permits, licenses, et cetera, to allow Rainey Brothers, or his designated successor owner, to reasonably revise the plans and construct and complete 165 units of apartments

without time limitation or penalty of any kind, at 267 to 270 MSL.

5. That the court issue an order declaring Petitioners' property and property rights and obligation of contracts were "taken" and damaged by Defendant through inverse condemnation for public use without any legitimate public purpose and without payment of just compensation; that same is not fairly debatable and summons a jury of inquest to determine amount of damages due Petitioners;

6. That the Petitioners have other, further and general relief as it may be entitled to upon trial of this cause.

FOOTNOTES

1. No person shall....be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

2. No shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 21. NO MAN'S SERVICES OR PROPERTY TAKEN WITHOUT CONSENT OR COMPENSATION. -- That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

4. Section 8. NO MAN TO BE DISTURBED BUT BY LAW. -- That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

5. Section 8. GENERAL LAWS ONLY TO BE PASSED. --The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass

any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunity, (immunities) or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

6. 29-16-123. ACTION INITIATED BY OWNER. -- (a) If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assesses the damages, as upon the trial of an appeal from the return of a jury of inquest.

(b) Additionally, the court rendering a judgment for the plaintiff in a proceeding brought under

subsection (a) of this section, arising out of a cause of action identical to a cause of action that can be brought against the United States under 28 U.S.C. Section l346(a)(2) or Section 1491, or the attorney general or chief legal officer of a political subdivision of the state effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement such sum as will in the opinion of the court, or the attorney general or chief legal officer of a political subdivision of the state reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceedings.

7. Section 10. (POWERS DENIED THE STATES) -- (1). No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

8. Section 20. NO RESTROSPECTIVE LAWS. --- That no retrospective law, or law impairing the obligations of contracts, shall be made.

9. Section 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

10. Section 1988. PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS; ATTORNEY'S FEES. The jurisdiction in civil and criminal matters conferred on the district courts by thc provisions of this Title, "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such law are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Respectfully submitted,

AGEE, KIM & PHELAN

By: S/ Ronald W. Kim

Ronald W. Kim,
Attorney for the
Petitioner.
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(901) 767-3520
D. N. 9060

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing second amended complaint on counsel of record for all parties at interest in this cause by hand-delivering a copy of the same addressed to the Deputy City Attorney, Mr. E. Brady Bartusch, Deputy City Attorney, City Attorney's Office, 314 City Hall, 125 North Mid-America Mall, Memphis, Tennessee 38103.

This 16th day of February, 1989.

AGEE, KIM & PHELAN

BY: S/ Ronald W.Kim

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Supreme Court, U.S.
FILED
APR 7 1992
OFFICE OF THE CLERK

(2)

NO. 91-1251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAINEY BROTHERS CONSTRUCTION COMPANY, INC. AND TRACY RAINEY,
PETITIONERS

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT, CITY OF MEMPHIS AND THE CITY OF MEMPHIS BUILDING DEPARTMENT,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS, WESTERN SECTION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENTS

QUESTION PRESENTED

I. Whether there are adequate and independent state legal grounds to deny the petitioners' motions to amend the complaints filed in the trial court and to refuse to invoke jurisdiction pursuant to 28 U.S.C. § 1257?

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RESPONDENTS

ON PETITION FOR WRIT OF CERTIORI
TO THE TENNESSEE COURT OF APPEALS,
WESTERN SECTION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

TENNESSEE RULES OF CIVIL PROCEDURE INVOLVED

Rule 15.03 Relation Back of Amendments.

Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a

misnomer or other similar mistake concerning the identity of the proper party, the action would have been brought against him. Except as above specified, nothing in this rule shall be construed to extend any period of limitations governing the time in which any action may be brought.

Rule 55.01 Entry

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, judgment by default may be entered as follows:

The party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian,

committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least five (5) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute.

STATEMENT OF THE CASE

This case arose out of petitioners attempts to secure from the Memphis and Shelby County Board of Adjustment (hereinafter Board) a variance from the elevation requirements for a 165-unit apartment project on a 14-acre tract of land in east Memphis. The Board granted the variance in August 1975. However, the granting of the variance was challenged for failure to provide a public hearing on the issue and the variance was later revoked. Petitioners request to reconsider the revocation was denied.

On May 27, 1976, two actions were filed in the Circuit Court of Shelby County, Tennessee, and proceeded independently until the Tennessee Supreme Court consolidated the actions.

In the first complaint styled Rainey Brothers Construction Company, Inc. v. Memphis and Shelby County Board of Adjustment, City of

Memphis, and City of Memphis Building Department, Docket No. 53654-8 R.D., a writ of certiorari was brought to review the action of the Memphis Board of Adjustment in revoking the variance sought by the petitioner.

The second complaint Rainey Brothers Construction Company, Inc. v. City of Memphis, a municipal corporation, and the City of Memphis Building Department, Docket No. 73473-8 R.D., sought damages allegedly resulting from the revocation of the variance.

On November 14, 1988, petitioners filed an amended complaint in each of the actions seeking another writ of certiorari, additional damages, and relief based upon new causes of action. Respondents filed motions to dismiss the amended complaints on December 30, 1988.

On February 10, 1989, appellant sought leave to file a second amended complaint and leave was granted. On March 8, 1989, the second amended complaints were filed. The second amended complaint sought the issuance

of another writ of certiorari, damages in the amount of $125,000,000.00, added as defendants members of the Memphis and Shelby County Board of Adjustment as of May 27, 1986, as individual defendants, and added a new petitioner, Tracy Rainey, individually. Motions to dismiss the second amended complaint were filed by respondents on March 21, 1989.

Orders were entered by the trial judge on August 2, 1989, sustaining the respondent's motions to dismiss the amended complaints, A-1, and ordering the cases to be tried on the original pleadings. (only the order in case no. 53654-8 R.D. is included as the order in case no. 73473-T.D. is virtually identical)

Subsequently, the petitioners appealed this case to the Tennessee Court of Appeals, Western Section, pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, which provides for interlocutory appeals of court orders. An opinion affirming the trial

court's order of dismissal of the amended complaints was entered on May 24, 1991. A-6.

Petitioners then filed a petition for permission to appeal to the Supreme Court of Tennessee, but their application was denied by an order entered by that court on November 12, 1991. A-20.

SUMMARY OF THE ARGUMENT

That the rulings by the state courts rested on adequate and independent state grounds and, therefore, that the petitioners have failed to demonstrate that this court should grant the petition for writ of certiorari pursuant to 28 U.S.C. § 1257.

ARGUMENT

Petitioners' primary contention is that the dismissal of their amended complaints by

the state trial court is a denial of due process and equal protection. Their petition for writ of certiorari, however, fails to support this claim in law or fact.

Petitioners intimate that the dismissal of the Second Amended Complaints was upheld by the Tennessee Court of Appeals and Tennessee Supreme Court as part of a longstanding policy of discrimination against claimants in the state courts of Tennessee who bring forth federal claims. The petitioners cite the case of Poling v. Goins, 713 S.W.2d 305 (Tenn. 1986) in support of such an implication. However, the petitioners fail to point out that in Poling, id., the Tennessee Supreme Court reviewed their earlier decision in Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969), and determined that since the decision in Chamberlain, supra, the federal courts had ruled that the federal courts did not have exclusive jurisdiction over federal legislation. The Tennessee Supreme Court,

without dissent, overruled Chamberlain, ibid. and held that actions under 42 U.S.C. § 1983 could be brought in a Tennessee state court. There is no showing by the petitioners that the courts of the state of Tennessee have engaged in such discrimination.

The actual issue to be considered in this case is whether or not there are adequate and independent state grounds to support a decision by this court to abstain from exercising its jurisdiction pursuant to 28 U.S.C. §1257. This court has long recognized that disposition of a case based on state procedural law can be independent and adequate grounds, provided the procedural rule is regularly followed. Barr v. City of Columbia, 378 U.S. 146, 149-150, 84 S.Ct. 1734, 1736, 12 L.Ed 2d 766 (1964); Hathorn v. Lovorn, 457 U.S. 255, 262-263, 102 S.Ct. 2421, 2426, 72 L.Ed 2d 824 (1982), rehearing denied; Johnson v. Mississippi, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed 2d 222 (1988).

This court has acknowledged that states have a legitimate reason to enforce their procedural rules and that a party's failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground to bar this court from reviewing the state court's decision. Michigan v. Tyler, 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, n. 7, 56 L.Ed 2d 486 (1978).

The decision of both the Tennessee Court of Appeals and the trial judge in this case was based on their interpretation of Tennessee Rule of Civil Procedure 15.03.

The petitioners, in their petition for writ of certiorari, claim that the trial judge, in his order dated August 2, 1989, A-1, held that the motion to dismiss was well taken as the petitioners had failed to demonstrate any violation of federal rights because there was an adequate post-deprivation remedy available. The petitioners then allege that

the Court of Appeals rendered their decision in the case on other grounds.

A close inspection of both of these orders reveal that the basis for the trial court's dismissal of the amended complaints, and the Court of Appeals upholding of that dismissal are identical.

In his order granting the motion to dismiss, the trial judge specifically found that the amended complaints must fail because the claims for inverse condemnation and claims under 42 U.S.C. §1983 were both barred by the applicable statute of limitations.

The Tennessee Court of Appeals, Western Section, also found in their opinion, A-6 that these claims were time barred. Supported by numerous citations, A-16, the Court of Appeals determined that the amended complaints raised new causes of action and did not relate back to the original pleadings.

It should also be noted that the Court of Appeals recognized that it would be

prejudicial to the respondents to grant the amendment due to the fact that the petition had been filed 12 years previously. Petitioners counter this finding in their petition for writ of certiorari by asserting that the respondents did not file a responsive pleading in this cause until 1988. Respondents concede that no responsive pleading was filed until that time, but would show that petitioners had the right to file a motion for default judgment pursuant to Tennessee Rule of Civil Procedure 55.01 prior to 1988, but failed to do so.

Nowhere in the petition for writ of certiorari do the petitioners cite any cases or facts to support their conclusion that they have been denied due process and equal protection by the courts of the state of Tennessee. Nor do the petitioners demonstrate that they will suffer actual harm if their petition is denied. In their original complaints, the petitioners asked that the

rulings of the board which revoked their variance be set aside as arbitrary, capricious, and illegal pursuant to their petition for request for writ of certiorari to the Circuit Court of the State of Tennessee. The trial court has never proceeded to determine this issue, and has never conducted a factual finding or hearing in this case.

This case should proceed forward on the petition for writ of certiorari to the state courts and not on causes of action first raised by the petitioners 12 years after the filing of the original complaints. The writ of certiorari to the Circuit Court of Tennessee is the only cause of action on which the petitioners should proceed in the trial court.

This Court should also be aware of several misstatements in the Petition for Writ of Certiorari. The Tennessee Inverse Condemnation Statute, T.C.A. § 29-16-123, and 42 U.S.C. § 1983 existed at the time of the

filing of both complaints. For reasons unknown to the respondents, petitioners did not choose to assert those causes of action at the time of the filing of the complaints, and therefore, did not, as asserted in their petition, seek "from the beginning of this case to assert all remedies available to them" (p. 11).

It should also be noted that in their list of parties, the petitioners name eight individuals who were members of the Memphis and Shelby County Board of Adjustment at the time that the variance in question was revoked. The plaintiffs attempted to add these individuals as defendants in their amended complaints, but the trial court and the Court of Appeals dismissed these individuals as parties A-3 and A-13, respectively. Both courts ruled that the petitioners failed to show that these prospective defendants knew that but for the petitioners' mistake they would have been

named parties to this action. The courts also found that the petitioners failed to show that but for a misnomer or other mistake the action would have been brought against these individuals. Tennessee Rule of Civil Procedure 15.03. The petitioner fails to put forward any facts or case law in their petition for writ of certiorari to show that these individuals should be added as parties to this suit. Therefore, it is respondent's contention that any such request to add additional defendants has been waived, and that the individuals listed as parties have been fully and finally dismissed from this action.

CONCLUSION

The petition for writ of certiorari should be denied and the decision of the Tennessee Court of Appeals should not be disturbed.

RESPECTFULLY SUBMITTED,

FRED E. JONES, JR.
COUNSEL OF RECORD
MONICE MOORE HAGLER
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ATTORNEYS FOR RESPONDENTS

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2. Opinion of the Tennessee Court of Appeals A-6

3. Order of the Supreme Court of Tennessee Denying Review A-20

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

RAINEY BROTHERS CONSTRUCTION COMPANY, INC., AND TRACY RAINEY, INDIVIDUALLY,

Petitioner,

No. 53654-8 R.D.

VS.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT, COMPOSED OF: RUFUS JONES; MRS. T. KYLE CRESON, JR.; ROBERT KNAPP; JOHN F. PALMER; JERRY E. TAYLOR; CARY WHITEHEAD; BARNEY GOLDING; JOHN S. SHEPHARD; AND EACH, INDIVIDUALLY; AND THE CITY OF MEMPHIS, A MUNICIPAL CORPORATION; AND THE CITY OF MEMPHIS BUILDING DEPARTMENT,

Defendants.

ORDER GRANTING MOTION TO DISMISS

This cause came on to be heard upon the Defendants' Motion to Dismiss the Second Amended Complaint, argument of counsel, and the entire record in this cause, from all of which;

It appears to the Court that the Defendants' Motion to Dismiss is well taken

and that the Second Amended Complaint should be dismissed and that this cause should proceed on the original pleadings filed on May 27, 1976, with the Defendants being only the original Defendants as set forth therein, and the Court will decide at a subsequent date the issue as to the right of the Petitioners to substitute Tracy Rainey, individually, as a Petitioner in this cause.

It further appears and the Court so finds that the Second Amended Complaint fails to state a claim upon which relief can be granted; that the action for inverse condemnation is a new cause of action and not properly a part of the pleadings before the Court, and the one-year Statute of Limitations (Tenn. Code Ann. 29-16-124) bars the Petitioner from inverse condemnation; that the claim for violation for Civil Rights 42 U.S.C. 1983, et seq., is a new cause of action that is barred by the one-year Statute of Limitations set forth in Tenn. Code Ann.

2803104(a); that there was no violation of state of federal laws or Constitution as an adequate postdeprivation remedy was provided by the state in the form of Tenn. Code Ann. 29-16-123, et seq., which Petitioner failed to utilize within the appropriate time; that because of the aforesaid statutes and law, including the appropriate application of the function of the Common Law Writ of Certiori and the great period of time involved, that only the original Defendants in the original pleading will remain parties; that the attempt to include the aforesaid allegations and the Board of Adjustment members in their individual capacities constitute new causes of action, which do not relate back to the original pleadings, as there was no notice in the original pleadings of these new causes of action under the most liberal reading thereof; that damages are not recoverable under the Common Law Writ of Certiori, which is the appropriate mechanism for judicial review of

actions of the Memphis and Shelby County Board of Adjustment.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss the Second Amended Complaint is granted for the reasons above set forth and that the Second Amended Complaint is dismissed; that this cause will proceed on the original pleading filed on May 27, 1976, with the original Defendants as named therein being the only defendants and does not include the members of the Memphis and Shelby County Board of Adjustment in their individual capacity, and the Court will decide at a subsequent date the issue as to the right of the Petitioner to add or substitute Tracy Rainey, individually, as a Petitioner in this cause; and that there being no just reason for delay, that a final judgment on the Motion to Dismiss the Second Amended Complaint is hereby entered in favor of the Defendants and the Defendants are allowed thirty (30) days from the entry of

this Order to respond to the original

Petition.

S/William W. O'Hearn
JUDGE

DATE: 2 August 1989

S/Hugh C. Howser
Attorney for Petitioner

S/E. Brady Bartusch
Attorney for Defendants

A TRUE COPY ATTEST
Clint Crabtree, Clerk

_____D.C.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

RAINEY BROS. CONSTRUCTION
COMPANY, INC. and TRACY RAINEY

Plaintiffs/Appellants

v. Shelby Law # 64

MEMPHIS & SHELBY COUNTY BOARD
OF ADJUSTMENT, CITY OF MEMPHIS
and CITY OF MEMPHIS BUILDING
DEPARTMENT

Defendants/Appellees

From the Circuit Court of Shelby County,
Tennessee

The Honorable William W. O'Hearn

William J. Harbison, Nashville
Attorney for Appellants

Monice Moore Hagler, Memphis
E. Brady Bartusch, Memphis
Attorneys for Appellees

Opinion Filed: May 24, 1991

AFFIRMED

HIGHERS, J.

TOMLIN, P.J., W.S. (Concurs)
CRAWFORD, J. (Concurs)

This matter is before the Court on an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. This appeals arises from two cases which were filed simultaneously on May 27, 1976, in the Circuit Court at Shelby County, Tennessee. However, the Supreme Court referred to the cases as "now consolidated" in its order granting permission for the interlocutory appeal. The plaintiff, Rainey Brothers Construction Company, Inc. (Rainey Brothers), brings this appeal asserting that the trial court erred in sustaining defendants' motions to dismiss the second amended complaints in both Circuit Court actions and in not allowing the proposed amendments to each complaint pursuant to Rule 15 of the Tennessee Rules of Civil Procedure.

Rainey Brothers owns a 13 acre tract of land in Memphis on which it planned to build a 165 unit apartment complex. On December 22, 1969 the Memphis and Shelby County Board of Adjustment (the Board) approved construction

of 165 apartments on the subject property at an elevation level of 274.9 msl. A request was submitted to the Board by Rainey Brothers for an interpretation of a condition on a previous application regarding the fill elevation level of the subject property. Pursuant to that request, on August 27, 1975, the Board ruled that the property need only be filled to an elevation of 270 msl. as recommended by the City of Memphis Engineering Department, rather than the previously required elevation of 274.9 msl. The Board relied upon the written recommendation of the Deputy City Engineer, which states that the 270 msl elevation is consistent with other new construction in the area. Following the Notice of Disposition lowering the fill elevation level of the subject property to 270 msl Rainey Brothers waited approximately 60 days before beginning construction in case an appeal was filed. No appeal was filed within that time and Rainey Brothers began

construction in accordance with a fill elevation level of 270 msl. Apparently, there was a group of citizens who objected to the project and their interests were represented in a letter from a local attorney to the City of Memphis Building Department in which objection was taken to the fact that no public hearing was held and no notice was given to anyone of the change in a "substantial condition" in the Notice of Disposition issued regarding the subject property. On April 28, 1976, eight months after the Board's ruling, the Board rescinded its action of August 27, 1975 and reinstated the previously required elevation of 274.9 msl.

Subsequently, on May 25, 1976, Rainey Brothers filed a Petition for Reconsideration asking the Board to reconsider its new disposition. The Board refused to grant the Petition forr Reconsideration.

On May 27, 1976, Rainey Brothers simultaneously filed two actions in the Circuit Court. The first action ("Rainey I") is against the Board and the City of Memphis Building Department. That action is captioned "Petition for Certiorari, Supersedeas, Injunction and Other Relief." In that action Rainey Brothers seeks an injunction superseding the action of the Board and preventing the City of Memphis Building Department from enforcing the Board's ruling. The second action ("Rainey II") is brought against the City of Memphis and the City of Memphis Building Department and seeks damages resulting from the Board's ruling.

On November 14, 1988, Rainey Brothers simultaneously filed amended complaints in both actions setting forth the facts in greater detail. At that time the defendants had not yet filed any answer. Rainey Brothers later made a Motion to Amend the Amended Complaints. The trial court entered an order

allowing Rainey Brothers to file the second amended complaints and the second amended complaints were both filed on March 8, 1989. Defendants moved to dismiss the second amended complaints and their motions were granted. On August 2, 1989, the trial court dismissed the second amended complaint in both actions stating that the causes should proceed on the original pleadings. The order states that the defendants shall only be those defendants as set forth in the original pleadings filed on May 27, 1976. The court also found that the second amended complaints bring up new causes of action which are barred by the statute of limitations and do not relate back to the original pleadings. It is on this order that Rainey Brothers appeals. Rainey Brothers asserts that the trial court erred in granting defendants' Motion to Dismiss the Second Amended Complaints and in not allowing the proposed amendments.

I.

Rainey Brothers attempts to add to the action in several ways through the second amended complaints. First Rainey Brothers made several additions to the named defendants in both suits. In Rainey I Rainey Brothers added each of the members of the Board, individually, as defendants. In Rainey II Rainey Brothers added the Board and each of its members individually as defendants.

The amendment of complaints is governed by Rule 15 of the Tennessee Rules of Civil Procedure. Rule 15.03 states:

> **Rule 15.03 Relation Back of Amendments**
>
> Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment

relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisified and if, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a misnomer or other similar mistake concerning the identity of the proper party, the action would have been brought against him. Except as above specified, nothing in this rule shall be construed to extend any period of limitations governing the

time in which any action may be brought.

Rule 15.03 sets forth two requirements which must be met in order for an amendment to change the parties against whom the claim is asserted. First, the new parties must have received such notice of the action that they will not be prejudiced in maintaining their defense. See Goss v. Hutchins, 751 S.W.2d 821, 824 (Tenn. 1988); Lease v. Tipton, 722 S.W.2d 379, 380 (Tenn. 1986). It is reasonable to assume that the members of the Board were aware of both actions brought by Rainey Brothers before they were made parties to the actions pursuant to the second amended complaints. However, Rule 15.03 requires more than merely that a potential new defendant be aware of the existence of the action prior to being made a party. The second requirement is that each potential new party must have known that for a misnomer or mistake concerning his or her identity, the action would have been

brought against him or her. Lease v. Tipton, supra. Furthermore, it has been held that the plaintiff has the burden of showing that the failure to name the new defendants in the original complaint resulted from a mistake concerning the identity of the proper parties. Smith v. Southeastern Properties, 776 S.W.2d 106 (Tenn. App. 1989). A mistake within the meaning of Rule 15.03 does not exist simply because the party who may be liable for conduct alleged in the original complaint was omitted as a party defendant. Id. at 109. The circumstances of the case before us do not satisfy the second requirement. Rainey Brothers has failed to show that the Board and its individual members knew that but for Rainey Brothers' mistake, they would have been named as parties to the actions to which they were later added by the second amended complaints. Furthermore, Rainey Brothers has failed to show that the failure to name these defendants in the original complaints resulted

from a mistake concerning their identity. The defendants must remain those named in the original pleadings.

II.

Rainey Brothers introduces several new claims to the action through the second amended complaints. Particularly noteworthy are the claims of taking, through a violation of the fifth and fourteenth amendments to the United States Constitution and article 1 section 21 of the Tennessee Constitution, violation of 42 U.S.C. § 1983 and inverse condemnation.

As provided in Rule 15, only those claims which relate back to the original pleadings are saved from the effects of the applicable statute of limitations. Tenn. R. Civ. P. 15.03. However, where the amendment in substance raises a new cause of action, the courts have repeatedly held that the amendment does not relate back to the original pleadings

and the statute of limitations continues to run until the amendment is filed. Energy Sav. Prods. Inc. v. Carney, 737 S.W.2d 783 (Tenn. App. 1987). Thus, the real question is whether the amendments raise a new cause of action.

There are several methods of determining whether an amendment raises a new cause of action or merely relates back to the original pleading. See Gamble v. Hospital Corp. of America, 676 S.W.2d 340 (Tenn. App. 1984). Tennessee courts have generally followed the statutory standard that the amendment must arise from the same conduct, transaction or occurrence as set forth in the original pleadings. Karash v. Pigott, 530 S.W.2d 775 (Tenn. 1975). Notice to the defendant is not expressly required by the statutory standard for relation back but the Tennessee Supreme Court has determined that notice is the critical element involved in determining whether amendments to pleadings relate back.

Floyd v. Rentrop, 675 S.W.2d 165, 168 (Tenn. 1984).

Rainey Brothers asserts that the claims of taking, violation of 42 U.S.C. § 1983 and inverse condemnation all relate back to the original pleadings. The original complaints ask merely that the actions of the Board be ruled illegal, arbitrary, and capricious; that an injunction be issued superseding the Board's actions; that the Board be enjoined from enforcing the action, and; that Rainey Brothers be given reasonable damages under $35,000.

Nothing in the general fact situation set forth in the original complaints put the defendants on notice that they may have to defend any of the foregoing claims of taking, 42 U.S.C. § 1983 or inverse condemnation. Given the fact that the defendants were not on notice from their original pleadings that they may have to defend these claims, the

amendments do not relate back to the original pleadings and given the fact that the amendments were filed over 12 years after the original pleadings, the defendants would be unfairly prejudiced if they were made to defend these new causes of action.

Thus, we affirm the trial court finding that the second amended complaints do not relate back to original pleadings as required by Rule 15 and finding that the trial court did not err in sustaining defendants' motions to dismiss the amended complaints. Costs are assessed to Rainey Brothers.

S/Highers
HIGHERS, J.

TOMIIN, P.J., W.S. (Concurs)

CRAWFORD, J. (Concurs)

IN THE SUPREME COURT OF TENNESSEE

RAINEY BROS. CONSTRUCTION
COMPANY, INC. AND TRACY RAINEY,

Plaintiffs-Appellants,

v. Shelby Law No. 64
No. 53654-8 R.D.

MEMPHIS & SHELBY COUNTY BOARD
OF ADJUSTMENT, ET AL.,

Defendants-Appellees.

and

RAINEY BROS. CONSTRUCTION
COMPANY, INC. AND TRACY RAINEY,

Plaintiffs-Appellants,

v. Shelby Law No.
No. 73473-8 T.D.

THE CITY OF MEMPHIS, ET AL.,

Defendants-Appellees.

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, it is the decision of the Court that the application should be and the same is hereby denied.

PER CURIAM